# Supreme Court of the United States

October Term, 1960.

No. 1004

JOSEPH A. BOLLENBERG

*Petitioner*

vs.

PEOPLE OF THE STATE OF NEW YORK

*Respondent*

**Petition For a Writ of Certiorari to the Court of Appeals of the State of New York.**

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## Index


| | Page |
|---|---|
| Opinions and Judgments Below | 1 |
| Jurisdiction | 3 |
| Statement | 4 |
| Statement as to Question I | 4 |
| Statement as to Question II | 18 |
| Questions Presented | 24 |
| Reasons for Granting the Writ | 24 |
| As to Second Question | 28 |
| Conclusion | 29 |


### CASES CITED.


| | |
|---|---|
| Bowman v. Loperena, 311 U. S. 262, 266 | 4 |
| Department of Banking v. Pink, 317 U. S. 264, 266 | 3 |
| Federal Trade Commission v. Minneapolis-Honeywell Co., 344 U. S. 206 | 4 |
| Gold v. United States, 352 U. S. 985 | 25 |
| Leishman v. Associated Wholesale Electric Co., 318 U. S. 203, 205-206 | 3 |
| People v. Ashby, 8 N. Y. 2d 238, 241 | 28 |
| Pfister v. Northern Illinois Finance Corp., 317 U. S. 144, 149-150 | 4 |
| Remmer v. United States, 350 U. S. 377, 347 U. S. 227 | 25 |
| Sinclair v United States, 279 U. S. 749 | 25 |
| United States v. Crescent Amusement Co., 323 U. S. 173-177 | 3 |
| Zimmern v. United States, 298 U. S. 167, 169 | 3 |

## OTHER AUTHORITIES CITED.


| | Page |
|---|---|
| 28 U. S. C., Sec. 1257, 612 (3) | 3 |
| New York Code of Crim. Proc., Sec. 366, 367 | 10 |
| Judiciary Law, Secs. 651, 657, 658, 659, 660, 661, 662, 667, 668, 669, 671 | 25 27 |
| N. Y. Constitution, Art. 1, Sec. 11 | 25 |
| U. S. Constitution, Amend. XIV, Sec. 1 | 25 |
| Code of Fair Practices, Article VII | 25 |


## APPENDIX.

### New York State Statutes:


| | |
|---|---|
| Penal Law, §1864 (Fraudulent Audit) | 31 |
| Penal Law, §1294 (Grand Larceny) | 32 |
| Code of Criminal Procedure, §366 | 32 |
| Code of Criminal Procedure, §367 | 32 |
| Judiciary Law, §659 | 33 |
| New York State Constitution, Article 1, §2 | 35 |


## EXHIBITS.


| | |
|---|---|
| A. Order Granting Enlargement of Time | 36 |
| B. Order to Show Cause and Supporting Affidavit of John R. Davison | 37 |
| Affidavit of Personal Service | 48 |
| C. Order Granting Motion | 49 |
| D. Order Amending Remittitur | 51 |
| E. Order Denying Re-argument | 53 |

# Supreme Court of the United States

October Term, 1961

No. .....

JOSEPH N. BOLLETTIERI,

*Petitioner,*

*against*

PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner prays that a writ of certiorari issue to review the order of the Court of Appeals of the State of New York, which affirmed a judgment of the Appellate Division of the State of New York, which in turn affirmed a judgment of the Supreme Court, Oneida County, New York, convicting the petitioner, Joseph N. Bollettieri, of the crime of grand larceny first degree, and obtaining the proceeds of a fraudulent audit and sentencing said petitioner to five (5) to ten (10) years in state prison.

### Opinions and Judgments Below.

The judgment of the Oneida County Supreme Court is based upon a jury verdict, finding the petitioner guilty and there was no opinion. The jury verdict was returned on

February 17th, 1960, and on February 23rd, 1960, the petitioner received a judgment of sentence as mentioned above.

Thereafter, the Fourth Department, Appellate Division of the State of New York, unanimously affirmed said judgment of conviction. Said order of affirmance was entered on July 1st, 1960, and is recorded at 11 Appellate Division Reports (New York) 906.

Thereafter and on July 12, 1960, permission to appeal to the Court of Appeals was granted by the Hon. John Van Voorhis, Associate Judge of the Court of Appeals. A certified copy of said order giving permission to appeal is attached to the record of the case and a copy of order to enlarge the time is attached hereto and marked Exhibit "A."

Thereafter, the Court of Appeals unanimously affirmed the judgment of the Appellate Division mentioned above on January 5th, 1961, and without opinion. Said order of the Court of Appeals is reported at 9 New York Reports, 2nd Series (New York State), page 629.

Thereafter, and on the 9th day of January, 1961, an order to show cause was signed by the Hon. Charles S. Desmond, Chief Justice of the Court of Appeals of the State of New York, requiring the respondent to show cause why re-argument on said appeal should not be granted, why a stay of execution of the judgment pending said re-argument should not be granted, and why the remittitur of this court should not be amended. See Exhibit "B."

Thereafter, the Court of Appeals denied said motion for re-argument, but granted a stay and said motion to amend the remittitur was further granted and was amended by adding thereto the following:

> "Upon the appeal herein, there were presented and necessarily passed upon questions under the Constitution of the United States, viz: defendant

contended that his rights to due process under the Fourteenth Amendment were violated when the trial court denied his motion for a discharge of the jury panel, and for an adjournment to permit defense counsel to establish State Police investigation of the prospective jurors was improperly conducted to the prejudice of the defendant, and when the trial court denied his motion for a mistrial based on a line of questioning pursued by the prosecution in the cross examination of the witness, Chapman A. Thomas."

The Court held there was no violation.

A copy of the Court of Appeals order is attached hereto and marked Exhibit "C."

## Jurisdiction.

The judgment or order of affirmance of the Court of Appeals was rendered January 5th, 1961, re-argument was denied by order dated March 12th, 1961. The petition for re-argument was timely made as shown by Exhibit "B" on January 12, 1961. The entire court heard the motion to re-argue on the substance, and denied re-argument but granted a stay and amended the remittitur on March 2nd, 1961 (see Exhibits "C," "D" and "E").

The judgment of this court is invoked under 28 U. S. C. Section 1257, 612(3), specifically that the rights and privileges and immunities of the petitioner have been violated as guaranteed under the Constitution of the United States. Jurisdiction as to timeliness is relied upon by Rule 22 of this court. Judgment is considered suspended pending the above mentioned motion and also by:

*Leishman v. Associated Wholesale Electric Co.*, 318 U. S. 203, 205-206;
*United States v. Crescent Amusement Co.*, 323 U. S. 173, 177;
*Zimmern v. United States*, 298 U. S. 167, 169;
*Department of Banking v. Pink*, 317 U. S. 264, 266;

*Pfister v. Northern Illinois Finance Corp.*, 317 U. S. 144, 149-150;
*Bowman v. Loperena*, 311 U. S. 262, 266;
*Federal Trade Commission v. Minneapolis-Honeywell Co.*, 344 U. S. 206.

## Statement.

### Statement as to Question I.

**Have the petitioner's rights under the due process clause of the Fourteenth Amendment of the United States Constitution been violated when the Trial Court denied his motion for a discharge of the jury panel and for an adjournment to permit defense counsel to establish that the State Police investigation of the prospective jurors was improperly conducted to the prejudice of the petitioner?**

In 1957 the petitioner was in the employ of the Public Works Department of the City of Utica, County of Oneida, New York, and held a position of Superintendent of Streets and Sewers. A Special Grand Jury charged the petitioner with the crime of grand larceny, first degree and with obtaining proceeds of a fraudulent audit. Both criminal sections are attached hereto and printed in the Appendix. The amount involved was Nine Hundred Fifty-six Dollars and Ninety-seven Cents ($956.97).

The Grand Jury that indicted the petitioner was a special one, called an Extraordinary Special and Trial Term of the Supreme Court of the County of Oneida and the prosecutor was also a special one, appointed by the Governor, to supercede the District Attorney of this county. The special investigation giving rise to this indictment and conviction commenced in June of 1958 and has been continuing since and still continuing at the present time. The Trial Judge was also a special one, appointed by the Governor and not from this district.

The trial began on January 18th, 1960, in one of two County Courthouses, which Oneida County has, namely Rome, New York. At the opening of court, counsel for petitioner made known to the Trial Court his desire to make a motion addressed to the panel of jurors and upon agreement of counsel, the following motion was made in chambers out of the hearing of the jury panel (see fols. 131 thru 137):

"Mr. Shanahan: Yes. If the Court please, at this time, on behalf of Mr. Bollettieri, whom I represent with Mr. Pawlinga, I would like to move for the discharge of the present panel of jurors, and for the selection of a new panel for the trial of this case upon the following grounds: It has come to my information through my associates in this matter, that apparently an investigation of these various prospective jurors now on this panel has been made by members of the State Police, who I am informed, are connected with the office of the Special Prosecutor. It is our information that this investigation has been conducted in this manner. *These troopers have gone to—some instances, to close neighbors of the prospective jurors, and in one instance that we know of, have gone to a relative of one of the prospective jurors, and have undertaken to question the various people whom they have sought out, apparently pursuant to a prepared questionnaire, wherein they inquire concerning the juror's general reputation; his religion, whether he attends church regularly, his political views, his views with reference to Italians or people of Italian extraction,* and generally and apparently fairly thoroughly, according to our information, seek to get information, in that manner concerning the prospective jurors. Now the difficulty about that situation, first let me say, I won't question the right of anyone to investigate in a proper way a jury panel or the prospective jurors, however, when it is done in this fashion by members of the State Police, who identify themselves as such, making inquiry of close neighbors and relatives, the information is very likely to, and in some instances we believe has, come back to the juror himself. The

result of that is that the juror is by that means to some extent intimidated or is likely to be, and we feel that such a method of interrogation of neighbors, relatives, to be entirely improper, likely to put the juror into the frame of mind that they are living in some sort of police state, and to destroy their effectiveness as fair, independent and impartial jurors.

*"Now, I would like to say to your Honor, that I don't make this motion without the definite belief that I am correct in my statement to you. If your Honor should see fit to hold a hearing on it, we would be willing to undertake to produce proof of these assertions. If, for instance, we could have until tomorrow morning to do so.*

* * * * * *

"Mr. Abelove: If your Honor please, I should like to join in Mr. Shanahan's motion in behalf of defendant Merlini and further call to the Court's attention that in one incident that has been called to my attention, *several of these troopers came into a very small hamlet in our County, and operated more or less out of a hotel, so that the entire community was aware that there were a group of state officers checking jurors for this case.* It was no secret, apparently around the hotel as to the objective, and any juror living in that community was certainly aware of the fact that at least in that hamlet, it had become a police state, insofar as this case is concerned.

"I join with Mr. Shanahan in stating to the Court that the effect on a juror's mind after that type of investigation, either a man in uniform or having identified himself as being a member of the State Police, can give these defendants, or at least defendant Merlini anything, but a fair trial, and I too, want to join with Mr. Shanahan in asking for a hearing on this" (fols. 131-137). (Italics added.)

In response to said motion the following colloquy took place:

"The Court: Do you want to be heard, Mr. Fischer?

"Mr. Fischer: Yes, sir. There are two immediate matters that arise in my mind, your Honor. First of all, the assertion here made, one assertion in particular made by Mr. Shanahan, where he was informed by his co-counsel and apparently was informed by somebody else about inquiries in connection with people of Italian extraction. Their feeling in that regard. *I am certain, I would say that that did not occur.* There is no doubt, however, and it is customary, as your Honor well knows, to check out a jury list, and in some instances, as your Honor is aware, this jury list and other jury lists have come through with people who have felony and misdemeanor convictions. So, it is vital, of course, that the jury list be checked.

"Now, the other problem that is of concern to me is this, that the investigation of the jury list was completed *on our part* in excess of two weeks ago. As your Honor is aware, this matter has been adjourned and now, at the date that the trial is ultimately to start, after adjourning the date when the trial is to commence at the request of defense counsel, we have no papers here of any kind, and I don't see how this could be tested in any way without papers other than statements of counsel allegedly on information afforded by somebody unnamed. So, your Honor, based on that, and these matters, none of which have ever come to my attention, I don't feel that there has been any showing made here in any sense of the word, any legal showing, and the motion should be denied" (fols. 138-141). (Italics added.)

In respect to the response that the charge was made "without papers" counsel for the defense said:

"While the Code of Criminal Procedure requires that a challenge to the array, within the proper meaning of that term, be in writing I can find no requirement that such a motion as this be in writing, but let me say this to the Court, that if your Honor would give us an opportunity to—to obtain some proper proof by way of affidavits, we would be glad to do that. But, we would need some time, of course, to do it" (fol. 144).

The Trial Court first resolved the problem presented as follows:

> "It occurs to the Court that if any—any influences of any kind were brought to bear, or were felt by any of these prospective jurors, that of course is a proper subject of inquiry by counsel in their examination of the individual jurors. It seems to me that that examination would give full opportunity to any of the parties to ascertain whether the jurors' minds were influenced in any way by these inquiries that were made. That that examination would give an adequate opportunity for such an inquiry and that being so, I would be inclined to deny defendants' motion here • • •" (fols. 146-147).

Speaking against this solution, counsel for the defense said:

> "While I appreciate that this undoubtedly, in the event your Honor would deny our motion, would certainly be a matter which we would pursue in the examination of the jurors, I would say the whole purpose, for instance, of having this hearing in the absence of the jury, would be completely destroyed if we are called upon to openly question the jurors in that regard, because we have no way of knowing that it has come to the attention of all of the jurors that they have checked, and we are certainly going to make that crystal clear to them if we are obliged to examine them in the presence of the others" (fol. 148).

The prosecution argued for this solution:

> *"Now, if inquiry is made and they know that that inquiry is made as to their qualifications to sit, I see no harm by it. I don't know how you would preclude it to it possibly coming to their attention"* (fols. 149-150). (Italics added.)

The Trial Court did not deny defense counsel's motion on the ground urged by the prosecution, that it was not then substantiated by "papers." The Trial Court assumed the facts stated by defense counsel to be correct (fol. 150).

The Trial Court denied the motion on the grounds (1) that there was no "direct showing that there was some improper approach to these jurors *themselves*" (counsel for the defense having previously admitted that no claim was made "that any contacts were made by any representatives of the Assistant Attorney General's office with prospective jurors themselves") (fols. 144-145) and (2) that it was a situation which the Trial Court thought could properly be "explored in the examination of the jurors" (fols. 150-153). The Trial Court said:

> "Well, the Court's position would be in the absence of a showing of some influence being brought to bear from some source *on any one of these individual jurors*, in the absence of such a showing, *there is no basis for any action on the part of the Court*. Whatever the talk in the neighborhood might have been, whatever the talk in the community might have been, and it is fair to assume, as I say, in a case of this sort, in this kind of community, that there would be plenty of talk, in the absence of some showing that some of this talk was brought to these jurors' attention, and in the absence of some showing that the jurors were in some measure influenced by it, *it doesn't seem to me that the Court is called upon, at this point, to take any action with reference to the qualifications of the panel.*
>
> "Mr. Abelove: Well, if your Honor please, as I understand it, we are seeking just that opportunity.
>
> "The Court: Well, you will be afforded the opportunity, Counsel, on the examination of jurors.
>
> "Mr. Abelove: *Well, by that time, the entire matter is before the panel*" (fols. 156-158). (Italics added.)

The Court did not hold the requested hearing (1) as to the nature and scope of the investigation the State Police made of the jurors (after they had been investigated, drawn and certified to the Court as qualified by the Commissioner of Jurors), (2) as to the extent that the nature and scope of such investigation was communicated to the jurors, and (3) as to whether such presumptively preju-

dicial conduct was harmful to defendant. The members of the State Police assigned to the staff of the prosecution who made the challenged investigation were not called and interrogated by the Court (New York Code of Crim. Proc., Sec. 367); nor, was any one of whom they made inquiry as to a juror examined by the Court. The prosecutor was not called upon to disclose his conduct and the conduct of his staff and, although the conduct charged to him and his staff was not denied, no justification was offered other than stated above and no further explanation was required by the Court (cf. New York Code of Crim. Proc., Sec. 366). Thus, counsel for defense were required to explore in a very limited way this intrusion by the State Police on the privacy of the jury by examinations in the presence of the panel of the members thereof.

Thereupon defense counsel was required to examine the prospective jurors on *voir dire*. One juror, when asked whether it had come to his attention that any inquiry had been made as to his qualifications as a juror, first answered yes and then no (fol. 222). Later, he sought to clarify his answers by saying:

> "Well, the other attorney asked a question there, but I don't think it was properly phrased. He asked me if anyone had investigated my qualifications as a juror. I was investigated by, I believe, members of the State Troopers, but they didn't investigate my qualifications as a juror. *They investigated my sobriety and habits, and I don't think that these are necessary juror qualifications.* So therefore, I say yes, and then no, to his question" (fol. 236). (Italics added.)

When asked if knowledge of such investigation had any effect upon him he said:

> "No, sir. *I have complete faith in the integrity of our New York State Police,* and would have no bearing on any decision I might make" (fols. 237-238).

Another juror was examined and answered as follows:

"Q. Now, has it by any chance come to your attention as to whether any investigation was made before you came here about your qualifications to serve? A. Oh, yes.

"Q. You did learn that some investigation was made? A. Well, I was—a neighbor, something said about jury duty, but nothing more or less.

"Q. Well, did you get some information that some inquiry had been made about you from your neighbors? A. Yes.

"Q. Well now, let me ask you, Mrs. Head, would that make any difference to you? A. *No, I was honored.* It didn't affect me at all" (fol. 267). (Italics added.)

Another was asked:

"Now, has it, Mr. Eisenhut, come to your attention at all that any previous investigation has been made about your qualifications to serve here? A. Yes. I knew like some of my neighbors, they said that they had been asked questions about me, but that is as far as it went, you know.

"Q. Well, does that make you feel any differently about serving as a juror here? A. No, no" (fol. 310).

Later he was asked:

"Q. And there is nothing in your mind, sir, concerning this investigation that was made of you, as to your qualifications to serve as a juror? A. No, there isn't. *You know, I was sort of surprised that they would—you know, pick me for some reason.*

"Q. I see. And there is nothing about that that makes you feel that you have got to answer to anybody about your own conscience? A. No, that is right" (fol. 328). (Italics added.)

Juror Mrs. Rita A. Maloy was asked if it had come to her attention that a special investigation had been made with reference to her qualifications as a juror and she an-

swered: "I was told by a neighbor that I was investigated" (fol. 353). She denied that the fact she was investigated would have any effect upon her (fols. 354-356). It is to be noted that this investigation took place during the "Christmas holiday season" immediately prior to January 4 when the jurors were required to report (fols. 355-356). *Mrs. Maloy also testified that her neighbors told her that the investigation was made by a State Trooper* (fol. 363). *At the time Mrs. Maloy was an employee of the State of New York and her husband had been so employed for twenty-four years* (fols. 372-373).

Juror Glen Hutchinson, who had been a county officer for ten years (fol. 390), said that he did not know of the investigation made of him (fol. 394).

Juror Victor Basile testified that about a week after he reported for jury duty a neighbor told him that he had been investigated (fols. 421-423). On re-examination *by the prosecutor* he testified:

> "Q. Mr. Basile, I wonder if I might ask this question. This investigation in advance as defense counsel puts it, do you have any resentment about your jury qualifications being examined into by the State Police? A. No, I don't" (fol. 435).

Another juror was examined as follows:

> "Q. While we are on the subject, Mr. Oertle, of the State Police, did it come to your attention that any investigation had been made into your qualifications? A. I heard rumors to that effect, yes.
>
> "Q. Well now, what, if any effect, does that have on you? A. None whatsoever.
>
> "Q. None whatsoever. It wouldn't have any effect upon your actions as a juror in this case? A. None.
>
> "Q. If selected? A. *I was curious at the time, because I—it was before I received my notice*, and after I received my notice, why then I understood what the situation was.

"Q. Then you realize what it was? A. That is right.

"Q. I see. Well, but you are sure, aside from that, that if you are selected here, the knowledge by you that such a check or investigation was made about you, would not— A. No, none whatsoever.

"Q. —have any bearing upon what your actions were as a juror here? A. No" (fols. 452-453).

• • • • • •

"Q. Well, just so that I understand it, Mr. Oertle, when were you summoned to appear for this jury service? A. December 31st.

"Q. December 31st, 1959, right? A. Yes, nine.

"Q. And you were served by whom, if you recall? A. I wasn't home at the time, and the notice was left.

"Q. I see. A. We have several farms that we operate, and apparently the people had been to the house, *in fact mother had said that they had been down at that house a couple of times*, and apparently they didn't catch me home. So, they left it with my brother, my younger brother.

"Q. Now, prior to that date, had you heard anything about being investigated? A. Yes, I did.

"Q. And when was that, about when? A. Oh, I would say maybe a week, possibly three or four days to a week.

"Q. That would be around the Christmas holiday? A. That is right.

"Q. *And from whom did you hear that? A. That was in the local barbershop.*

"Q. And I assume that just about everything is heard around the local barbershop? A. I believe it is, isn't it?

"Q. And, who operates that barbershop? A. A fellow by the name of Larry Hunter.

"Q. And was it he that told you about it? A. Yes, it was.

"Q. And can you recall what it was that he said about it? A. Oh, only that he said that I was being drawn for jury duty. I thought he was just kidding, and I passed it off pretty much at that.

"Q. Was there anything further said concerning your qualifications or— A. No, nothing at all along those lines. What was done was just in a jokingly way, I would say, if anything" (fols. 462-464). (Italics added.)

A juror who was a rural mail carrier testified that the postmistress of the station out of which he worked told him that he had been investigated (fols. 492-494).

A juror who had previously been called to the prosecutor's office to give information testified:

"Q. I see. Alright. Now, with reference to the proposition of whether you, by any chance learned as to whether there was any investigation made concerning your qualifications to serve as a juror here, Mr. Keating, did you ever hear that any such thing did occur? A. Yes. *I knew it right at the time it was. Well, it was the trooper investigated at my home where my mother lives at the same home.*

"Q. At your own home? A. Well, it is—it is a twin house. My mother lives on one side, my wife and I live on the other side, and a trooper happened to come to that side of the house, so I was told about it the same—the same night.

"Q. I see. Well, you mean then that *whatever inquiry was made that you heard of was made by your mother?* A. Yes, that is the only one that I know of.

"Q. All right. Now, let me ask you, and did you learn from her that it was a trooper? A. Yes, he identified himself.

"Q. Yes. Now, the thing that concerns me, of course, is what effect that has on you and what effect it would have upon you as a juror in this case? A. Well, no.

"Q. Did it have any effect on you at all? A. No effect" (fols. 519-521). (Italics added.)

* * * * * *

"Q. And you—there is nothing about this Trooper having come and discussed this matter with your mother that you have carried into this room? A. Oh, no, that meant nothing, that is—" (fol. 528).

On re-examination by the *prosecution* he testified:

"Q. On your thinking in the case? A. No.

"Q. All right. Now, Counsel Shanahan brought up the fact, I believe it was Mr. Shanahan, that you had been investigated and that your mother had been asked about your qualifications. You understand that most jurors are investigated prior to their service? A. Yes.

"Mr. Abelove: I object to that, if the Court please?

"The Court: Yes, I don't think that has any place in the interrogation, Counselor. That is a statement of fact, not a question.

"Mr. Casella (Assistant Special Prosecutor): Well, would that fact—*the fact that your mother had been talked to by a person investigating your qualifications, would that in any way prejudice you against the People of the State of New York in this particular case?*

"The Witness: No, no, it wouldn't" (fols. 534-535). (Italics and parenthesis added.)

Another juror testified:

"Let me ask you, Mrs. O'Neil, did it come to your attention that any investigation was made, concerning you before you came here? A. *My neighbor come over to use the telephone, and she told me, she says, 'Well, I am not supposed to tell you, I guess, but I heard you was investigated for jury duty.'* And that was all I heard about it. And the next day they brought the notice and I wasn't home, but my daughter took it for me" (fols. 552-553). (Italics added.)

Still another juror said that he did not know that an investigation had been made with reference to him (fol. 582).

The examination of Juror Chester Mandry included:

> "Q. Did it come to your attention with reference to any prior investigation or check concerning your qualifications? A. Yes, it did.
>
> "Q. And do you mind telling us in what manner that information came to you? A. Well, my wife told me about it, she said that she talked with one of the neighbors.
>
> "Q. I see. Now, let me ask you, would the fact that such a check or investigation had been laid in the fashion that it was made, have any effect upon your ability to act as a fair, impartial and independent juror in this case? A. I don't believe so, sir" (fol. 617).

Juror Robert Calkins said it had "not the least" come to his attention that his qualifications had been checked (fol. 633). He hadn't heard about it (fol. 640).

Juror Carl Flock testified:

> "Let me ask you did it come to your attention as to whether any previous check or investigation was made of your qualifications? A. Yes.
>
> "Q. And do you mind telling us how that came to your notice? A. Well, our next door neighbor came over the same—the same day that they came to her house, and she says, 'I put you on the spot.' She says, 'I put you in the Grand Jury.' I says, 'Thanks.' And I knew it from the very same day.
>
> "Q. I see. Well now, apparently the impression you got was that it had something to do with the Grand Jury, your being on the Grand Jury, is that it, rather than a trial jury? A. Yes.
>
> "Q. Well now, Mr. Flock, you have heard me ask other jurors with reference to similar situations, does that have any effect on you, the fact that you were checked on or investigated in that fashion? A. *Well, the only thing I thought is, if they wanted to know something, why didn't they come and ask me.*

"Q. *Well, they got pretty close?* A. *Yes, I guess so.*

"Q. Well, does it have any—does it have any effect on you? A. No" (fols. 674-676). (Italics added.)

Two or three days after his neighbor told him of the investigation he received his summons to serve (fols. 684-685). This witness was peremptorily challenged by the prosecution, after being re-examined as follows:

"Q. You indicated when Mr. Shanahan inquired from you as to whether it had come to your attention that someone had inquired in your neighborhood concerning your qualifications, and your answer to Mr. Shanahan, as I recall it, was 'Well, I couldn't understand why they didn't come to me to ask the question.' A. That is right.

"Q. Do you recall that, sir? A. Yes, sir.

"Q. All right. Now, by reason of your reaction to that question I would like to determine your reaction to an inquiry from your neighbors, if you assumed that it is improper for a person to contact you directly after you had been on a jury list? Would you tell me what your reaction is or would be in those circumstances? A. Well, as long as I have set here, all I can hear is, and think, is that it is supposed to be so quiet, you are not supposed to talk to anybody else, you are not supposed to talk about the trial, *but still they will go out and they will get your neighbors in on it,* and the neighbors tell you more about it than what you know of it. So, if they had came to me and said to me, 'Now, we are going to put you on the jury, we are going to try to get you on the jury,' or this or that, I think that would be a whole lot better than *instead of spread it all over the neighborhood.*

"The Court: Let the Court state this to you. That it would be entirely improper for any of the parties to approach any individual juror. I would make that statement to you in connection with the question that Mr. Fischer has asked. That no party

can properly approach a juror. Perhaps you weren't in the courtroom, but I have made that statement to all of you, that if any party approached any one of you, you are to report that to the Court immediately. So, it is entirely improper for any party through any agent or anyone else to approach a juror. I think perhaps that might clarify your thinking a little bit on the subject.

"By Mr. Fischer:

"Q. In any event, as I understand your reaction, Mr. Flock, *by reason of the fact that there was some inquiry made in your neighborhood, it is my understanding that you have some resentment of that,* you don't like that type of thing? A. *That is right*" (fols. 702-705). (Italics added.)

**Statement as to Question II.**

**Was the petitioner's rights violated under the Constitution of the United States by the cross examination of the witness Chapman A. Thomas?**

Defendant called as a witness a Mr. Thomas. He was the senior bookkeeper in the Department of Public Works in the City of Utica (fol. 3458), and was an important witness since, among his duties, was the preparation of requisitions for material purchased by the Public Works Department including the requisitions addressed to Charles G. Kellogg Lumber Company for certain materials which were the basis of the two counts of the indictment, particularly Count Two having to do with the preparation and auditing of fraudulent requisitions, purchase orders and vouchers.

Before the trial, Mr. Thomas had been required to appear on three occasions at the office of the Oneida County Special Investigation for the purpose of giving testimony

with reference to the requisitions and orders directly at issue in the trial (fols. 3780-3785). On the first two occasions, Mr. Thomas appeared accompanied by attorneys from the Corporation Counsel's office of the City of Utica and on one occasion, answered questions contained in some fifty-five pages of testimony. On the second appearance, Mr. Thomas, as a result of some confusion with reference to the identity of the forms involved, mistakenly gave certain answers and as a result, was threatened by Mr. Weintraub, one of the staff of the Oneida County Investigation (fols. 3789-3793). As a result, Mr. Thomas, on the third appearance, corrected the testimony which he had previously given and thereafter claimed his constitutional privilege to refuse to answer by reason of the intimation that he would be indicted for perjury. This was brought out, over objection on cross examination by the prosecution. Mr. Thomas was cross examined by the prosecutor as follows:

"Q. Did you testify before the Grand Jury? A. No, I didn't.

"Q. Was that on advice of counsel? A. That was on advice of counsel.

"Q. Who was your counsel? A. Mr. Pawlinga.*

"Q. And did you discuss this case with Mr. Pawlinga? A. I did.

"Q. Did you discuss it with him before you went and were called before the Grand Jury? A. Sir?

"Q. Did you discuss it with him when you were called before the Grand Jury? A. Yes.

"Q. And before that? A. Before that.

"Q. Well, did you tell Mr. Pawlinga that you testified before the Grand Jury? A. No, I didn't.

* * * * * *

"By Mr. Fischer:

"Q. Did you tell Mr. Pawlinga before September 21st, of 1959, that you did testify before the Grand

* Mr. Pawlinga also was defense counsel herein. The question was directed to instructing the defendant.

Jury concerning vouchers and purchase orders? A. I—not the Grand Jury, at your office.

"Q. Well, did you tell him you testified before the Grand Jury concerning the purchase orders and vouchers? A. No, I did not.

"Q. You did not? A. No.

• • • • • •

"By Mr. Fischer:

"Q. Now, you testified, did you not, before the Attorney General's office on December 17th, 1959? A. I don't know just exactly the date, but I did testify.

"Mr. Fischer: I submit a copy of the minutes. I have only one copy, your Honor, for defense counsel. They can perhaps share it. And I will mark this for identification if I may.

"The Court: People's Exhibit 144 for identification.

"(Whereupon, minutes were then received and marked People's Exhibit 144 for identification.)

"By Mr. Fischer:

"Q. *When you were asked in connection with these purchase orders and vouchers before the Attorney General's office on December 17th, 1959, you refused to answer questions in connection with them on the grounds that those answers might tend to incriminate you, isn't that so?*

"Mr. Shanahan: Pardon me. Before you answer it, would you read that, please?

"(Whereupon, the last question by Mr. Fischer was then read by the reporter.)

"Mr. Shanahan: Now, what page is this? I haven't had a chance to look at this, of course.

"Mr. Fischer: Well, I am not reading from it, I am posing to him a general question. Do you understand the question?

"The Witness: I do.

"By Mr. Fischer:

"Q. All right, will you respond to it. A. I refuse to answer.

"The Court: *What? Will you repeat the question please, Mr. Hunt?*

"(Whereupon, the reporter then repeated the same question as before.)

"The Witness: *Yes.*

"By Mr. Fischer:

"Q. Well now, are you no longer of the opinion that any answers you give about those requisitions will incriminate you?

"Mr. Shanahan: Well, I object to that, if the Court please. This witness has given testimony. I submit it is argumentative.

"The Court: Overrule the objection, Counselor.

"Mr. Shanahan: Exception.

"The Court: Cross examination. Will you repeat the question please, Mr. Hunt?

"(Whereupon, the last question by Mr. Fischer was then read by the reporter.)

"The Witness: No.

"By Mr. Fischer:

"Q. You are no longer of the opinion that they will incriminate you? A. That is right.

"Q. You have since, being called before the Grand—the Attorney General's office on December 17th, you have since changed your mind, is that correct, sir? A. I could answer then but—

"The Court: Well, will you repeat—did you take the question, Mr. Light? Will you repeat it please, that last question?

"(Whereupon the last question by Mr. Fischer was then read by the reporter.)

"The Court: Answer yes or no.

"The Witness: Yes.

"By Mr. Fischer:

"Q. You have since changed your mind. Now, on page 12 of the minutes of December 17, 1959, were you asked this question and did you give this answer,

"'Did you destroy, Mr. Thomas, any copies of the purchase requisitions prepared in your department during the year 1957? A. I refuse to answer on the grounds that it might incriminate me.'

"Mr. Shanahan: Well, if the Court please, *I object to this that it is not in any manner contradictory of any testimony given by this witness, that the witness had the privilege and the right if he saw fit to exercise it to claim his privilege.* And that answer does not constitute any admission of the correctness of the question.

"The Court: I would so instruct the jury in accordance with your statement. I would state that counsel's statement is absolutely correct. However, are you objecting to the question?

"Mr. Shanahan: I do object to the question upon the ground that the only purpose for which I know, is that it's proper to cross examine a witness using previous testimony is when the testimony contradicts the testimony given at a later time by that same witness. And my point is, of course, that the answer as read does not have the effect of being contradictory and, therefore, that it is incompetent and improper.

"The Court: I will certainly instruct the jury in accordance with the statement made by Mr. Shanahan. With reference to this characterization of the effect of the taking of this constitutional privilege by the witness. However, any previous acts or statements or declarations of the witness in his course of life are admissible in this examination. And I will allow the question and direct the witness to answer.

"Mr. Shanahan: Well, your Honor, I have no desire to argue the matter at this time, and ask that it be held in abeyance however, until I get an

opportunity to do—*I am very sure that I can call to your Honor's attention some decisions indicating that a claim of privilege is not a proper means, that is, to show a previous claim of privilege is not proper method to cross examine.* And that is the only purpose for which this could be used, would be contradict. I don't go along with your Honor on the proposition that anything—

"The Court: You say you have no authority at this time, Counselor?

"Mr. Shanahan: I don't have any in my hand, I didn't anticipate this.

"The Court: We will take a short recess.

* * * * * *

"(Proceedings after recess.)

"The Clerk: If the Court please, the defendants, the jury and the attorneys and the witness in the box, are all present.

"The Court: All right. Would you repeat the last question, Mr. Light?

"(Whereupon, the last question and answer were then read by the reporter.)

"The Court: I will reserve on that, you may proceed.

*"Cross Examination by Mr. Fischer (Continuing):*

"Q. All right, sir. I will withdraw that, the question now, in any event, for the record" (fols. 3587-3609). (Italics added.)

The foregoing cross examination occurred on Friday and thereafter, adjournment was taken until the following Monday morning, at which time certain authorities were submitted to the Court indicating such examination to be improper and a motion was then made for a mistrial in view of the improper questions and examination at the previous session of court. The Court denied the motion (fols. 3644-3690).

Earlier in the trial, the prosecution called as a witness, Dominick Padula, a carpenter employed by the City of Utica. On cross examination, the prosecution developed over objection that the witness appeared at the Attorney General's office and refused to answer certain questions propounded to him upon the ground that his answers might tend to incriminate him (fols. 1341-1355).

On February 17th, 1960, the jury found the petitioner guilty.

## Questions Presented.

As mentioned above, the following questions are presented to this Court:

I. Have the petitioner's rights under the due process clause of the Fourteenth Amendment of the United States Constitution been violated when the Trial Court denied his motion for a discharge of the jury panel and for an adjournment to permit defense counsel to establish that the State Police investigation of the prospective jurors was improperly conducted to the prejudice of the petitioner?

II. Was the petitioner's rights under the due process clause of the Fourteenth Amendment of the United States Constitution violated when the Trial Court denied his motion for a mistrial based on a line of questioning pursued by the prosecution in the cross examination of the witness, Chapman A. Thomas?

**Reasons for Granting the Writ as to the First Question:**

The motion and the response thus presented the Court with this situation: Counsel for the defense, as an officer of the Court, made a charge that the prosecution through the members of the State Police assigned to its staff had

conducted an unauthorized, illegal and prejudicial investigation of the members of the panel of trial jurors all of whom had already been investigated, drawn and certified to the Court as qualified by the Commissioner of Jurors (Judiciary Law, Sections 651, 657, 658, 659, 660, 661, 662, 667, 668, 669, 671); unauthorized—because the sections of the law cited vest in the Commissioner of Jurors the exclusive power to determine by investigation the qualifications of prospective jurors prior to the *voir dire* examination; illegal—because not authorized and also because even the Commissioner of Jurors is barred from inquiring into the religion, church attendance, political views and racial or ethnological prejudices of prospective jurors (Judiciary Law, Section 661; Code of Fair Practices for the Executive Branch of the New York State Government, Article VII—promulgated by Governor Rockefeller*; N. Y. Const., Art. 1, Section 11; U. S. Const., Amend. XIV, Section 1); prejudicial—because it was an unauthorized and prohibited official intrusion into the privacy of the jury, and presumptively prejudicial, particularly since the qualifications of its members had already been determined by the only agent of the government authorized to make such a determination prior to the *voir dire* examination (*Gold v. United States*, 352 U. S. 985; *Remmer v. United States*, 350 U. S. 377, 347 U. S. 227; *Sinclair v. United States*, 279 U. S. 749). "In a criminal case any private communication, contact or tampering, directly *or indirectly*, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court * * * with full knowledge of the parties" (347 U. S. 229). "* * * It is the law's objective to operate as freely

* "All state agencies shall avoid in forms or requests for information any item or inquiry expressing any limitation or specification as to race, color, creed, national origin or age unless the item or inquiry is expressly required by statute or is required in good faith for a proper purpose and prior notification of its use has been given by the agency to the State Commission Against Discrimination."

as possible from outside unauthorized intrusions purposefully made" (350 U. S. 382). *"The mere suspicion that he, his family and friends are being subjected to surveillance by such persons is* enough to destroy the equilibrium of the average juror and render impossible the exercise of calm judgment upon patient consideration" (279 U. S. 764). (Italics added.)

The only response the prosecution made to the charge was an expression of personal opinion that inquiries were not made "in connection with people of Italian extraction," and expression of personal opinion that there had to be a further check on the jurors to determine whether any had a felony or misdemeanor conviction, an expression of personal opinion that the charges could not be tested without papers, and a personal assertion that none of these matters had come to the attention of the prosecution.

Thus, it was not denied that the prosecution had indirectly, and without authority, intruded on the privacy of the jurors to the extent of State Police inquiries as to their religion, habits of worship and political views. Nor was it denied that this was done in such a way as to come to the attention of the jurors. In addition, an issue of fact was raised as to whether the inquiry extended to the jurors' views as to Italians or people of Italian extraction. Petitioner's name discloses his origin.

The only justification offered for the investigations made by the State Police was the unsubstantiated general assertion that there was need for ascertaining whether the jurors had previous convictions. It must be presumed that the Commissioner of Jurors had previously performed his duty in this respect. Furthermore, the charge was not that any inquiry was made as to whether the jurors had felony or misdemeanor convictions (conviction of a misdemeanor is not a disqualification unless it involves moral

turpitude, Judiciary Law, Section 662), but even if the charge had encompassed such an inquiry, there was no assertion of any need for such an inquiry extending to State Police contact of relatives, neighbors and community *associates of the jurors.* (Italics mine.)

In the brief for respondent on the appeal to the Court of Appeals much was made of the fact that the defense accepted these jurors and did not challenge them for cause. Overlooked was the fact that the Court had already rejected a motion to discharge these jurors for cause and the fact that each juror accepted said that he would not be influenced by the fact that he was investigated. Much also was made in respondent's brief in the Court of Appeals of the fact that when the jury was accepted the defense had six unused peremptory challenges. Overlooked was the fact that the defense could not have secured an uninvestigated jury even if it had used all of the peremptory challenges and the fact that accepted trial practice and sound judgment dictated that peremptory challenges be reserved and not used upon the first twenty jurors called, particularly where the Court had denied a motion to dismiss the panel for cause and had even refused to hold a requested hearing as to whether cause for dismissal existed.

As shown above, the result of the procedure the Court forced upon the defense was that all the prospective jurors were made aware of the fact that the State Police had conducted an unauthorized and illegal investigation of their religious, political and ethnological views. See folios 5599-5600, 5640, 5865-5869, 5884-5885.

There is no question that the Trial Judge approved of the investigation the state police made of the jurors, and that he made known his approval to the jurors. See folios 460-461, 704-705.

**As to Second Question:**

**II. The Trial Court deprived defendant of his constitutional right to a fair trial when it denied defense counsel's motion for a mistrial after it had permitted a defense witness's prior claim of constitutional privilege against self-incrimination to be used, over objection, to attack his credibility.**

**The only purpose the prosecution could possibly have had in asking defense witness Thomas whether he had refused to answer questions (put to him by prosecution at the Attorney General's office) on the ground that his answers might tend to incriminate him was that of prejudice or attack on the credibility of the witness. As the Court of Appeals said in *People v. Ashby*, 8 N. Y. 2d 238, 241:**

> **"No one will now question the generality expressed in *Halpern v. United States (supra)* (353 U. S. 391), that a citizen's assertion of his constitutional right to refuse to incriminate himself cannot afterwards be the basis of an attack on his credibility." (See 98 C. J. S., Section 464, p. 332.)**

**In the *Ashby* case the Court of Appeals held that the question as to the witness's prior claim of privilege was proper because the defense had previously made an issue out of the witness's willingness to talk and tell the true facts.**

**In the prosecution's brief to the Court of Appeals in the case at bar, it was admitted that "there are clear factual distinctions between *Ashby* and present facts" but nonetheless it was sought to have the Court come to the same conclusion, i. e., that the defense had opened the door to such line of questions. Here the defense did no such thing. It merely asked if the witness had testified before the Grand Jury and the answer was no or if the witness**

had testified before the Attorney General and the answer was yes (fols. 3510-3511). Both answers were correct. There was no attempt to show by the witness himself "that he had been ready to talk but that the prosecutor, to fob off a complete investigation had failed to use him as a witness" (8 N. Y. 2d 241).

The main ground taken by the prosecution in its brief to the Court of Appeals for a holding by the Court that the defendant's and witnesses' constitutional rights were not impaired by the question as to prior claim of privilege was that the question was unanswered. *That is not true.* As the foregoing quotation from the record shows, the question was asked and answered. Furthermore, the question and answer were read back in the jury's presence at the direction of the Court at least twice (fols. 3596-3609).

It was also argued in the Court of Appeals that the defense failed to make a proper objection to this line of questions. On this, the record, set forth above, is clear and speaks for itself.

The record also shows that the prosecution pursued over objection the same line of questions in respect of another witness (fols. 1341-1355).

## CONCLUSION.

**For the foregoing reasons, this petition for writ of certiorari should be granted.**

Respectfully submitted,

ANTHONY J. FERNICOLA.

Date:

# APPENDIX.

## Penal Law.

Section 1864: Obtaining proceeds of fraudulent audit or payment.

A person who, being or acting as a public officer or otherwise, by wilfully auditing, or paying, or consenting to, or conniving at the auditing or payment of a false or fraudulent claim or demand, or by any other means, wrongfully, obtains, receives, converts, disposes of or pays out or aids, or abets another in obtaining, receiving, converting, disposing of, or paying out any money or property, held, owned, or in the possession of the state, or of any city, county, or village, or other public corporation, or any board, department, agency, trustee, agent or officer thereof, is guilty of a felony, punishable by imprisonment for not less than three nor more than five years, or by a fine not exceeding five times the amount or value of the money or the property converted, paid out, lost or disposed of by means of the act done or abetted by such person, or by both such imprisonment and fine. The amount of any such fine when paid or collected, shall be paid to the treasury of the corporation or body injured. A conviction under this section forfeits any office held by the offender, and renders him incapable thereafter of holding any office or place of trust.

A transfer in whole or part of any deposit with any bank or other depository, or of any credit, claim or demand upon such depository, whereby the right, title or possession of the owner or holder of such deposit, or of any custodian thereof, is impaired or affected, is a conversion thereof under this section.

§1294. Grand larceny in first degree

A person is guilty of grand larceny in the first degree, who steals, or unlawfully obtains or appropriates, in any manner specified in this article:

1. Property of any value, by taking the same from the person of another in the night time; or,

2. Property of the value of more than twenty-five dollars, by taking the same in the night time from any dwelling house, vessel, or railway car; or,

3. Property of the value of more than five hundred dollars, in any manner whatever.

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## Code of Criminal Procedure.

Section 366. Denial of Challenge, How made, and Trial thereof.

If the challenge be denied, the denial may, in like manner, be oral, and must be entered upon the minutes of the court; and the court must proceed to try the question of fact.

Section 367. Who may be examined on trial of challenge.

Upon the trial of the challenge, the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons, may be examined to prove or disprove the facts alleged as the ground of the challenge.

## Judiciary Law.

§659. Examination as to fitness

No person's name shall be entered on a jury ballot or list unless he has stated to the commissioner, in a certificate or questionnaire pursuant to section twelve hundred thirty-two-a of the penal law, his qualifications in writing in his own hand and has signed such certificate or questionnaire.

In order to *ascertain a juror's qualifications*, the commissioner may either

(1) mail to the prospective juror a questionnaire form on which to enter the name, address, occupation, claims for exemption and such other questions as the law may require, which the person to whom the questionnaire is mailed must fill out in his own hand, sign and return within one week to the commissioner; or

(2) summon the prospective juror to appear before him for the purpose of filling out the questionnaire and testifying as to the competence, qualifications, eligibility and liability of himself or any other person to serve as a juror and to present claims for exemption or disqualification. Such person shall not be entitled to any fee or mileage when responding for such purpose. Such summons may be served personally or by leaving it at the person's residence or place of business with a person of suitable age and discretion, or by mail. If served personally or by substitution the summons shall require the person summoned to attend not less than three days after service. If served by mail the summons shall require the person summoned to attend not less than five days after the mailing thereof.

One or more successive summonses may be served upon the same person when he fails to attend as required by a former summons. When a person has so attended twice

and furnished all information required, he shall not be required to attend again for one year thereafter.

The commissioner may, in his discretion, dispense with examination of the person so notified where another person cognizant of the facts is produced and testifies in his stead and it appears from the testimony of such other person that the person notified is disqualified, not qualified or exempt.

The commissioner may, in his discretion, forward to any appropriate police authorities within the county for checking against the records of such authorities, the names of any or all persons found otherwise qualified by him for jury service.

Notwithstanding the foregoing provisions of this section, the justices of the appellate division may by rule require that, in any county contained within their respective departments,

(a) the questionnaires required in accordance with option numbered (1) above shall be filled out in the prospective juror's own hand, signed and returned to the commissioner.

(b) each prospective juror shall be personally examined by the commissioner,

(c) the names of prospective jurors found otherwise qualified shall be forwarded by the commissioner to the appropriate police authorities within the county for checking against the records of such authorities. Added L. 1954, c. 305, §1; amended L. 1955, c. 797, §1, eff. July 1, 1955. (Italics mine.)

## New York Constitution.

Article 1, Section 2. Trial by jury; how waived.

Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver. Amended by Constitutional Convention of 1938; approved by the people Nov. 8, 1938.

## Exhibit A.

*Order Granting Enlargement of Time.*

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twentieth day of October A. D. 1960.

Present,

HON. CHARLES S. DESMOND, *Chief Judge, presiding.*

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Mo. No. 587

THE PEOPLE &c.,

*Respondent,*

*vs.*

JOSEPH N. BOLLETTIERI,

*Appellant.*

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A motion having heretofore been made herein upon the part of the appellant for enlargement of the time within which to argue the above entitled appeal to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the case set down for argument during the November, 1960, session of this Court, appellant's brief to be served and filed not later than November 1, 1960.

A copy

RAYMOND J. CANNON
Clerk

## Exhibit B.

*Order to Show Cause and Supporting Affidavit of John R. Davison.*

STATE OF NEW YORK,

COURT OF APPEALS.

CLERK'S OFFICE

I, RAYMOND J. CANNON, Clerk of the Court of Appeals of the said State of New York, do hereby certify that I have compared the annexed copy of Affidavit and Order to Show Cause in People of the State of New York, Respondent, against Joseph N. Bollettieri, Appellant, with the original on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals, at the City of Albany, this twenty-fifth day of April A. D., 1961.

RAYMOND J. CANNON
Clerk

STATE OF NEW YORK,

COURT OF APPEALS.

PEOPLE OF THE STATE OF NEW YORK,

*Respondent,*

*against*

JOSEPH N. BOLLETTIERI,

*Defendant-Appellant.*

An appeal having been taken to this court and on January 5, 1960 the judgment of the Appellate Division Fourth Judicial Department affirming the judgment of the Supreme Court Oneida County convicting the defendant of the crimes of violation of Sections 1294 and 1864 of the Penal Law having been affirmed by this court and it having been made to appear that in the event such affirmance shall stand upon re-argument review will be sought in the Supreme Court of the United States, now, upon the annexed affidavit of John R. Davison sworn to on the 9th day of January, 1961 and after hearing John R. Davison, Esq. in support of this motion and Maxwell Spoont, Esq., opposed, it is

ORDERED, that the respondent show cause at a session of the Court of Appeals to be held on the 20th day of February, 1961:

1. Why re-argument should not be granted herein and if granted,

2. Why a stay of execution of the judgment herein pending the determination on re-argument should not be granted, and if re-argument be not granted,

3. Why the remittitur of this court should not be amended as specified in the annexed affidavit, and meantime, sufficient reason appearing therefor, it is

FURTHER ORDERED, that all proceedings to enforce the judgment herein be and they hereby are stayed until the hearing and determination of this motion, and it is

FURTHER ORDERED, that bail as presently fixed be and the same hereby is continued.

s/ Service hereof on or before Jan. 16, 1961 will be sufficient.

Albany, Jan. 12, 1961.

s/ CHARLES S. DESMOND
Chief Judge.

STATE OF NEW YORK,

COURT OF APPEALS.

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PEOPLE OF THE STATE OF NEW YORK,

*Respondent,*

*against*

JOSEPH N. BOLLETTIERI,

*Defendant-Appellant.*

---

State of New York,
County of Albany, ss:

JOHN R. DAVISON, being duly sworn, says:

1. I am an attorney admitted to practice in the courts of this State and I have been engaged by Anthony J. Fernicola, Esq. substituted attorney for defendant-appellant to act as counsel on this application.

2. Pursuant to permission granted by Hon. John Van Voorhis, an Associate Judge of this Court, defendant appealed to this court from a judgment of the Appellate Division Fourth Judicial Department affirming without opinion a judgment of the Supreme Court Oneida County convicting defendant of the crimes of violation of Sections 1294 and 1864 of the Penal Law.

3. On January 5, 1961 this Court affirmed without opinion the judgment so appealed from.

4. Defendant-appellant hereby requests an order that respondent show cause: Why re-argument should not be granted and, if granted, why a stay of execution of the judgment pending the determination on re-argument should

not be granted and, if re-argument be not granted, why the remittitur of this Court should not be amended to show that upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States.

5. This motion is brought on by this application for an order to show cause because, in order to protect the rights of defendant-appellant, an order must be issued staying all proceedings to enforce the judgment pending hearing and determination of this motion and continuing bail as presently fixed, and because time and the size of the record do not permit deponent to make a detailed examination of the points which this Court may have overlooked or misapprehended in affirming the judgment appealed from.

6. On the appeal defendant-appellant raised, and this Court necessarily passed upon, the following substantial questions under Amendment XIV of the Constitution of the United States:

(a) Did the Trial Court deprive defendant of his Constitutional right to be tried by a fair and impartial jury when, despite undenied specific charges of acts on the part of the prosecution which could have influenced the panel of jurors, it denied a motion by defendant's counsel that the panel be discharged and a new one selected on the sole ground that there was no "direct showing that there was some improper approach to these jurors themselves" (F. 153) no "showing of some influence being brought to bear from some source on any one of these individual jurors" (F. 156) and denied defense counsel's motion for a short adjournment to produce such proof on the sole ground that the matter was properly "the subject of inquiry in the examination of jurors" (FF. 153-160).

(b) Did the Trial Court prejudice the Constitutional rights of the defendant in requiring and permitting in the presence of the panel exploration of the influence upon each member as the result of the investigation made of them by the State Police.

(c) Did the Trial Court deprive defendant of his Constitutional right to a fair trial when it denied defense counsel's motion for a mistrial after it had permitted a witness's prior claim of Constitutional privilege against self-incrimination to be used over objection to attack his credibility (FF. 3601-3690).

7. In addition defendant-appellant raised on the appeal substantial questions whether the conduct of the prosecution in making improper use of the evidence in his summation constituted reversible error (FF. 4585-4602; 5280-5283; 5401-5402) and whether the Trial Court committed reversible error in submitting to the jury over objection the question whether certain witnesses were accomplices (FF. 5355-5359; 5386) and in refusing to charge that they were accomplices as matter of law, particularly William Kirk, whose testimony was read back to the jury at his request (FF. 5415-5430).

8. Prior to the return day of the order to show cause, submitted herewith, a printed brief will be filed with the Court showing why re-argument should be granted. The brief will bring to the Court's attention cases later than those submitted on the appeal. For example, *Gold v. United States*, 352 U. S. 985; *Remmer v. United States*, 347 U. S. 227; *Stone v. United States*, 113 F. 2d 70.

9. For the purpose of this motion attention is called to these facts of record: On the opening day of the trial, before the selection of a jury, application was made to the Trial Court for the discharge of the panel of jurors because: An investigation had been made by members of the New York State Police on behalf of the prosecution

of the individual members of the jury panel in such a manner that the fact of such investigation would, of necessity, have become known to them and would be likely to have the effect of coercing them to the prejudice of the defendants. Members of the New York State Police, had made inquiry, from, in some instances, next-door neighbors, business associates, or close relatives of the members of the jury panel. Such inquiry was conducted in such a manner as to clearly identify the persons making such investigation as police officers and that such inquiry was made in connection with the particular case which the jurors were selected to hear. The investigation consisted of calling upon various individuals, connected as aforesaid with the members of the panel, and questioning said individuals with the use of a prepared questionnaire wherein information was sought as to the nationality, religion, political affiliations of the prospective jurors and other matters, including the possibility of any prejudice against persons of Italian origin. The manner of conducting this inquiry was clearly intended that the prospective jurors should become aware of the fact that such an investigation was made and was therefore bound to have some effect upon their action as jurors in the trial of the cases against these defendants, scheduled to be heard by that particular panel. The prosecution conceded that an investigation of the type charged had in fact been made.

Prior to the commencement of the selection of a jury, defense counsel asked for an adjournment until the following day in order to bring before the Court witnesses to establish the truth of the statements made by defense counsel as the basis for their application to the Court and assurance was given to the Court that in the event of such an adjournment, proof would be forthcoming at any time the Court would be willing to hear it (FF. 135, 144, 150). The Court denied the application for an adjournment to enable the defense to produce proof as offered and directed that the selection of the jury begin (F. 145).

In denying the application, the Trial Court held that the matter of the State Police investigation could be included in the questioning of jurors concerning their qualification to serve (FF. 145-148). The inevitable result by this procedure was to acquaint all of the members of the panel with the type of investigation objected to although many of the prospective jurors may have been up to that time, unaware of any investigation of them, or their fellow members of the panel (F. 148). As a result, all of the members of the panel became aware of the investigation and the manner in which it was conducted by members of the State Police Department and undoubtedly came to the conclusion that they as well had been investigated in the same manner. During the entire examination of jurors, all unexcused prospective jurors were in the courtroom listening to the *voir dire* examinations.

* * * * *

Mr. Thomas was called as a witness by the defendant. Before the trial, Mr. Thomas had been required to appear on three occasions at the Office of the Oneida County Investigation for the purpose of giving testimony with reference to the requisitions and orders directly at issue in the trial (FF. 3780-3785). On the third occasion, he corrected the testimony which he had previously given and thereafter claimed his Constitutional privilege to refuse to answer by reason of the intimation that he would be indicted for perjury. This was brought out, over objection, on cross examination by the prosecution.

Earlier in the trial, the prosecution called as a witness, Dominick Padula, a carpenter employed by the City of Utica. In his cross examination, it was developed under the authority of *People v. Savvides*, 1 N. Y. 2d 554, that he had been granted immunity. On re-direct examination, the prosecution developed over objection that the witness appeared at the Attorney General's office and refused to answer certain questions propounded to him upon the

ground that his answers might tend to incriminate him (FF. 1341-1355).

If re-argument is denied defendant intends to seek review in the Supreme Court of the United States of the foregoing questions under the United States Constitution which were raised on the appeal.

10. Therefore, the remittitur of this Court should be amended, if re-argument be denied, to state that upon the appeal there were presented and necessarily passed upon questions under Amendment XIV of the Constitution of the United States, viz.,

(a) Did the Trial Court deprive defendant of his Constitutional right to be tried by a fair and impartial jury when, despite undenied specific charges of acts on the part of the prosecution which could have influenced the panel of jurors, it denied a motion by defendant's counsel that the panel be discharged and a new one selected on the sole ground that there was no "direct showing that there was some improper approach to these jurors themselves" (F. 153) no "showing of some influence being brought to bear from some source on any one of these individual jurors" (F. 156) and denied defense counsel's motion for a short adjournment to produce such proof on the sole ground that the matter was properly "the subject of inquiry in the examination of jurors" (FF. 153-160).

(b) Did the Trial Court prejudice the Constitutional rights of the defendant in requiring and permitting in the presence of the panel exploration of the influence upon each member as the result of the investigation made of them by the State Police.

(c) Did the Trial Court deprive defendant of his Constitutional right to a fair trial when it denied defense counsel's motion for a mistrial after it had permitted a witness's prior claim of Constitutional privilege against

self-incrimination to be used over objection to attack his credibility (FF. 3601-3690).

11. The jury returned its verdict against defendant on February 17, 1960, and on motion of the prosecutor he was committed pending sentence (FF. 5290, 5503-5517).

12. Defendant was sentenced on February 23, 1960 to be confined in Attica State Prison for not less than five or more than ten years (F. 5536).

13. Deponent is informed that defendant immediately upon being sentenced was taken to the county jail in Rome, N. Y. and was confined there until March 15, 1960, on which date Hon. Donald T. Gorman, Justice of the Supreme Court of the State of New York, granted a certificate of reasonable doubt and admitted him to bail in the sum of $10,000.00; that on July 1, 1960 the Appellate Division Fourth Department affirmed the judgment of conviction and that on July 12, 1960 Hon. John Van Voorhis, one of the judges of this Court, granted defendant permission to appeal and permitted defendant his freedom on bail as presently fixed.

14. Defendant is 44 years of age, married, and has had no previous conviction (FF. 124-125).

15. Defendant should continue to enjoy his freedom on bail as presently fixed pending determination of this motion whereby defendant presents serious questions as to the legality of his conviction and seeks further consideration by this Court of those questions and amendment of its remittitur in the event that re-argument is denied so that he can make application to the Supreme Court of the United States for review of the questions raised under the Constitution of the United States.

16. No previous application has been made to any court or judge for the relief herein asked.

WHEREFORE, it is respectfully requested that an order be issued requiring respondent to show cause at a session of the Court of Appeals to be held on the 20th day of February, 1961:

1. Why re-argument should not be granted herein and if granted,

2. Why a stay of execution of the judgment pending the determination on re-argument should not be granted, and if re-argument be not granted,

3. Why the remittitur of this Court should not be amended as above specified; that an order be issued staying all proceedings to enforce the judgment herein until the hearing and determination of this motion; and that an order be issued continuing the bail as presently fixed.

s/ JOHN R. DAVISON

Sworn to before me this
9th day of January, 1961
s/ GERTRUDE E. MAIN
Notary Public, State of New York
Residing in Albany County
Commission Expires March 30, 1962

*Affidavit of Personal Service.*

State of New York,
County of Albany, ss:
City of Albany,

ANTHONY J. FERNICOLA, being duly sworn, deposes and says that he served the within order & papers attached thereto upon the following named Maxwell Spoont, at Albany, N. Y. at the following times and places viz: on Jan. 12, 1961 at Albany, N. Y. by delivering to and leaving with Maxwell Spoont personally a true copy thereof, and deponent further says that he knew the person so served to be the same person mentioned and described in the said order as Attorney for Respondent therein, and that at the times of making such service deponent was over twenty-one years of age.

ANTHONY J. FERNICOLA

Sworn to before me, this
12 day of Jan., 1961
s/ RAYMOND J. CANNON
Notary Public, State of New York
My Commission expires 3/30/62

## Exhibit C.

*Order Granting Motion.*

STATE OF NEW YORK,

IN COURT OF APPEALS.

**At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the second day of March A. D. 1961.**

Present,

HON. CHARLES S. DESMOND, *Chief Judge, presiding.*

---

Mo. No. 96

THE PEOPLE, &c.,

*Respondent,*

*vs.*

JOSEPH N. BOLLETTIERI,

*Appellant.*

---

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had:

ORDERED, that the said motion be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Defendant contended that his rights to due process under the Fourteenth Amendment were violated when the trial court denied his motion for a discharge of the jury panel and for an adjournment to permit defense counsel to establish that the State Police investigation of the prospective jurors was improperly conducted to the prejudice of defendant, and when the trial court denied his motion for a mistrial based on a line of questioning pursued by the prosecution in the cross examination of the witness, Chapman A. Thomas. The Court of Appeals held that there was no violation of defendant's rights.

And the County Court of Oneida County is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GEARON KIMBALL
Deputy Clerk

## Exhibit D.

*Order Amending Remittitur.*

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the second day of March A. D. 1961.

Present,

HON. CHARLES S. DESMOND, *Chief Judge, presiding.*

---

Mo. No. 96

THE PEOPLE, &c.,

*Respondent,*

*vs.*

JOSEPH N. BOLLETTIERI,

*Appellant.*

---

The judgment of the Appellate Division affirming the judgment of the Supreme Court, Oneida County, convicting the defendant, Joseph N. Bellettieri, of the crimes of grand larceny first degree and obtaining the proceeds of a fraudulent audit, having been affirmed by this Court on the fifth day of January, 1961, and a motion to amend the remittitur to show that on said appeal there were presented and necessarily passed upon questions under the Constitution of the United States being granted herewith and

it having been made to appear in the papers on said motion that review of said affirmance will be sought in the Supreme Court of the United States, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that all proceedings to enforce the judgment herein be and they hereby are stayed pending the hearing and determination of a petition for certiorari to the Supreme Court of the United States and, it is

ORDERED, that bail as presently fixed be and the same hereby is continued; it is further

ORDERED, that the stay granted hereby shall become inoperative and of no effect immediately upon the expiration of the time limited for an application for certiorari if no application is then pending.

A copy

RAYMOND J. CANNON,
Clerk

## Exhibit E.

*Order Denying Re-argument.*

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the second day of March A. D. 1961.

Present,

HON. CHARLES S. DESMOND, *Chief Judge, presiding.*

---

Mo. No. 96

THE PEOPLE, &c.,

*Respondent,*

*vs.*

JOSEPH N. BOLLETTIERI,

*Appellant.*

---

A motion for a re-argument of the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

A copy

RAYMOND J. CANNON
Clerk

COPY

# Supreme Court of the United States

No. 1001, October Term, 1960

BRIEF FOR RESPONDENT IN OPPOSITION

# INDEX.


| | PAGE |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Questions Presented | 2 |
| Constitutional Provisions and Statutes Involved | 2 |
| Statement | 3 |
| A. How federal questions were raised | 3 |
| B. Brief summary of facts | 3 |
| C. Facts surrounding the Motion for an additional adjournment and for discharge of the jury panel | 8 |
| D. Facts surrounding the mistrial motion based on the cross examination of defense witness Chapman A. Thomas | 14 |
| Argument | 18 |
| I. Concerning the motion for discharge of the jury panel | 18 |
| II. Concerning the motion for mistrial based on the cross examination of defense witness Thomas | 26 |
| Conclusion | 29 |
| Appendix A: Statutes | 1a |
| B: Record of motion for discharge of jury panel | 17a |
| C-1: Chart of unaccepted trial jurors | 28a |
| C-2: Chart of accepted trial jurors | 33a |
| D: Portions of cross examination of defense witness Thomas | 35a |

II.

CITATIONS

CASES:


*Adamson* v. *California*, 332 U. S. 46 ..... 28
*Brown* v. *Mississippi*, 297 U. S. 278 ..... 28
*Cohen* v. *Hurley*, ___ U. S. ___, 81 S. Ct. 954 ..... 28
*Fay* v. *New York*, 332 U. S. 261 ..... 23, 24, 25
*Gold* v. *United States*, 352 U. S. 985 ..... 22
*Grunewald* v. *United States*, 353 U. S. 391 ..... 26
*Knapp* v. *Schweitzer*, 357 U. S. 371 ..... 28
*Palko* v. *Connecticut*, 302 U. S. 319 ..... 23, 28
*People* v. *Ashby*, 9 A. D. 2d 464, *rev'd.* 8 N. Y. 2d 238 ..... 16, 27
*People* v. *Kruger*, 302 N. Y. 447 ..... 18
*People* v. *O'Keefe*, 281 A. D. 409, *aff'd.* 306 N. Y. 619, *cert. den.* 347 U. S. 989 ..... 19
*Remmer* v. *United States*, 350 U. S. 377 ..... 22, 23
*Sinclair* v. *United States*, 279 U. S. 749 ..... 22, 23
*Snyder* v. *Com. of Massachusetts*, 291 U. S. 97 ..... 28
*Twining* v. *New Jersey*, 211 U. S. 78 ..... 28
*United States* v. *Costello*, 255 F. 2d 876, *cert. den.* 357 U. S. 937 ..... 20
*United States* v. *Sing Kee*, 250 F. 2d 236, *cert. den.* 355 U. S. 954 ..... 26, 27, 29


STATUTES AND CONSTITUTIONAL PROVISIONS:


N. Y. Penal Law § 1294 ..... 3
N. Y. Penal Law § 1864 ..... 4
N. Y. Code of Criminal Procedure, Ch. III, §§ 359-387 inc. ..... 18, 19
N. Y. Judiciary Law §§ 657, 659, 661, 662, 664, 665, 665-a ..... 20, 21
N. Y. Constitution, Art. I, § 2 ..... 24
U. S. Constitution, Amendment XIV ..... 23, 24, 28

IN THE

# Supreme Court of the United States

No. ....., October Term, 1960

JOSEPH N. BOLLETTIERI,

*Petitioner,*

v.

PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

## BRIEF FOR RESPONDENT IN OPPOSITION

### Opinions Below

The judgment of conviction was unanimously affirmed, without opinion, by the Appellate Division, Fourth Department, reported at 11 A.D. 2d 906, 205 N. Y. S. 2d 1004 (Case 2). The Court of Appeals unanimously affirmed, also without opinion, reported at 9 N. Y. 2d 629, 210 N. Y. S. 2d 232 (Case 1).

### Jurisdiction

The judgment of conviction was affirmed by the Court of Appeals on January 5, 1961. Reargument was denied (Ex. "E" of Petition), but the remittitur ordered amended

on March 2, 1961 (Ex. "C" of Petition). The jurisdiction of this Court is invoked by Petitioner under 28 U. S. C. Section 1257(3).

## Questions Presented

I

Whether the petitioner was denied due process of law under Amendment XIV of the Constitution of the United States when the Trial Court denied his motions for an additional adjournment and for discharge of the jury panel because of an alleged improper inquiry by members of the New York State Police into the background qualifications of prospective jurors prior to trial.

II

Whether the petitioner was denied due process of law under Amendment XIV of the Constitution of the United States when the Trial Court denied his motion for a mistrial founded upon certain cross examination of defense witness Chapman A. Thomas.

## Constitutional Provisions and Statutes Involved

The pertinent provisions of the Penal Law of the State of New York (Penal Law §§ 1864 and 1294) and of the Constitution of the State of New York (Article I, Section 2) are set forth in the Petition at pp. 31, 32, 35. The pertinent provisions of the Constitution of the United States (Amendment XIV, Section 1, clause 3), of the Judiciary Law of the State of New York (Judiciary Law §§ 657, 659, 661, 662, 664, 665, 665-a) and of the Code of Criminal Procedure of the State of New York (Code of Criminal Procedure, Chap-

ter III, §§ 359-387 inc.) are printed in Appendix A, *infra*, pp. 1a-16a.

## Statement

### A. How Federal Questions were Raised

The federal questions presented by the petition were never raised in the Trial Court or in argument or briefs on appeal to the Appellate Division, Fourth Department, or the Court of Appeals. The issues were first submitted on the motion for reargument or amendment of the remittitur to the Court of Appeals (Ex. "B" of Petition). On March 2, 1961, the Court of Appeals ordered the remittitur amended to include those questions and stated therein that "upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States."

The motions considered in the questions presented were made.

1) for an additional adjournment and for discharge of the jury panel—immediately prior to the *voir dire* examination of Jurors; and

2) for a mistrial because of cross examination of a defense witness—during such cross examination.

### B. Brief Summary of Facts

Petitioner was indicted by the Extraordinary Special and Trial Term of the Supreme Court of the State of New York, held in and for the County of Oneida, on August 25, 1959 and charged in two counts with the crimes of Grand Larceny in the First Degree (Penal Law § 1294), and Obtaining the Proceeds of Fraudulent Audit or Payment (Penal Law

§ 1864), felonies (pp. 31, 32 of Petition). At this time and during the period of the indictment (January 1 to September 30, 1957) petitioner was Superintendent of Streets and Sewers for the Department of Public Works of the City of Utica. On November 4, 1959, the same Grand Jury indicted Charles G. Merlini with similar counts of aiding and abetting petitioner in the commission of those crimes. At that time, and during the period of the indictment, Merlini was the purchasing agent for the City of Utica. During the trial of the action, petitioner was represented by Paul Shanahan, Esq., and Stephen J. Pawlinga, Esq.; Merlini, by Milton A. Abelove, Esq. (for some time prior to trial, Merlini had been represented also by Mr. Pawlinga).

The People were then, and are now, represented by Louis J. Lefkowitz, Attorney General of the State of New York, under Executive Orders originally issued October 14, 1958 by then Governor Harriman, as continued thereafter by present Governor Rockefeller, which orders superseded the District Attorney of Oneida County in the areas of public officers, official corruption, gambling, bribery, prostitution, etc.

The indictments, consolidated for trial, charge that petitioner, while a city officer, had constructed a home in the City of Utica in 1956 and 1957, causing city funds to be paid for a portion of the materials used, with the knowledge and assistance of Merlini (fols. 13-27).

Petitioner commenced construction of his home in the fall of 1956. In January of 1957, he induced a subordinate city employee, Dominick Padula, to complete the work on his basement and garage, which areas had merely been roughed in by the contractor. Padula ordered various materials

from a private lumber company, telling the salesman that they were to be charged to the Department of Public Works of the City and that it had been approved by purchasing agent Merlini. The salesman (Kirk) called City Hall and was told over the telephone by someone who identified himself as Merlini, that the charge was correct and that the billing should be made to his attention. The first three invoices were marked for the address of petitioner's private residence and delivery was made to that location by the lumber company itself.

Thereafter, the bulk of the subsequent orders were phoned in by Padula to the lumber company, the invoices were marked for the Department of Public Works to the attention of Merlini and were picked up and signed for by two other Department of Public Works employees (Louis Belmont and Joseph Bouse). All of these materials were delivered to petitioner's private residence and placed by Padula in his home. The work done by Padula in the home included wood panelling of the garage and basement, and partitioning the basement into several rooms to include a kitchen, storeroom, combination bar and playroom and a separate toilet area. The total amount of the lumber company's invoices, subsequently billed to the City, amounted to $956.22.

Billing of the materials by the lumber company, and payment by the city was accomplished in substantially the following manner:

The lumber company mailed a copy of each separate invoice to the city, attention of co-defendant Merlini, and received back from him copies of the purchase orders with blank vouchers which they were to complete and sign as having delivered those materials to city employees for city

use. The first purchase order received by the lumber company had attached thereto a white slip of paper which listed various invoice numbers of the lumber company, the dollar total of which came to exactly the amount as set forth in the purchase order. The bookkeeper of the lumber company copied the contents of the purchase order onto the voucher and mailed it back to the city for payment. Thereafter, a check was issued by the city to the lumber company. The same procedure was followed for three succeeding purchase orders. The lumber company, relying on the total dollar amounts involved never checked the original invoices.

The face of the purchase orders as sent to the lumber company stated that the materials were to be charged under various ordinances passed by the Common Council of the City, such charges to be made to the capital appropriations account for materials placed in two different engine houses of the city fire department, the incinerator plant and the main garage for the Department of Public Works. Petitioner had personally signed as recipient on behalf of the city for the materials as listed in the purchase orders. So-called "pink receiving" copies were still attached to three of the purchase orders, the fourth receiving copy being missing from the city files, the signatures by petitioner having certified that the materials were in fact received by the city, for city use. Prior to indictment by the Grand Jury, representatives of the Attorney General's office, with proper authorization, had taken an inventory of the lumber material in petitioner's basement and garage and discovered that such lumber materials as were visible were substantially of the same type, quality and quantity as billed by the lumber company's invoices in the manner described.

Testimony adduced at the trial disclosed that the material from the lumber company did not in fact go to the city locations as billed, but that the materials received and used by the fire department and Department of Public Works were from other private lumber companies. Further comparison between the invoices of the lumber company and the city purchase orders showed that the materials listed on the invoices were not the same as listed on the purchase orders; that in other instances where the same materials were listed, unit price amounts were changed. By this mechanism, the city records did not disclose payment for material such as "knotty pine" and, further, by this mechanism, the total dollar amount of the purchase orders was carefully changed to equal the total dollar amounts as listed on the lumber company's billings from its ledger records.

Trial of the action was from January 18 to February 17 of 1960 and was technically complicated by the introduction of hundreds of documents of various departments of the city government of Utica and of the private lumber company, together with the use of charts admitted as an aid to the jury for the purpose of consolidating all of this detailed accounting material. Defenses were interposed by both defendants, though only co-defendant Merlini took the stand in his own behalf.

The trial jury found petitioner guilty as charged by the indictment and at the same time acquitted co-defendant Merlini of the charges of aiding and abetting the petitioner.

### C. Facts Surrounding the Motion for an Additional Adjournment and for Discharge of the Jury Panel

On December 8, 1959, 150 prospective trial jurors were drawn for trial of the consolidated actions, notice of trial date of January 4, 1960, being duly served on defense counsel. On December 22nd, 1959, Mr. Pawlinga notified the Trial Court that Mr. Shanahan, trial counsel for petitioner, was then engaged in trial of another action and might not be available for the January 4, 1960 trial date. At that time the Court indicated that the trial date would be retained, subject to adjournment if trial counsel were otherwise engaged.

On January 4, 1960, the date noticed for trial, *the jury panel then being present*, the People indicated their readiness to proceed, but Mr. Pawlinga requested a two-week adjournment because of the prior engagement of trial counsel, and stated to the Court that after conferring with Mr. Shanahan, he would be ready to proceed on January 18, 1960. At that time, Mr. Abelove was substituted as counsel for co-defendant Merlini in place of Mr. Pawlinga. Mr. Abelove agreed to the adjourned trial date, but specifically "reserved all rights for motions that can be made during the course of proceedings directed to the jury". Prior to recessing on January 4, the Court entertained applications from jurors for excuse from service, read to the panel a list of qualifications of jurors so they might advise him of any change in their qualifications since "there may be some little slipup in your application, or perhaps your circumstances have changed since you were last examined by the jury commissioner". At this time, no objection was made to the trial panel or any member of it by either Mr. Pawlinga representing petitioner, or Mr. Abelove, representing the co-defendant.

On January 18, 1960, immediately prior to the *voir dire* examination of jurors, trial counsel for the defendants made the motions for an additional adjournment and for a discharge of the jury panel; those motions are set out in full at Appendix "B", *infra*, pp. 17a-27a.

A reading of the initial motion as made by Mr. Shanahan, counsel for petitioner (fols. 131-135), indicates:

1. Defense counsel did not question the right of either the prosecution or the defense to inquire into the background qualifications of prospective jurors;

2. That the source of his "information" was derived from his trial associates (Messrs. Pawlinga and Abelove).

3. That he believed an inquiry had been made by members of the state police of the qualifications of prospective jurors, which members he was "informed" were connected with the office of the Attorney General;

4. That the inquiry was allegedly conducted of neighbors of jurors and "in one instance that we know of," of a relative of one of the prospective jurors;

5. That his information led him to believe that the inquiry was made apparently pursuant to a prepared questionnaire with inquiry allegedly made concerning the juror's general reputation, his religion, his attendance at church, his political views, and his views concerning Italians or people of Italian extraction;

6. That the result of such inquiry was likely to intimidate the prospective jurors and put the juror "into the frame of mind that they are living in some sort of a police state."

No claim was made that there was any personal contact with prospective jurors (fols. 145, 154).

The prosecution advised counsel that if they would name the juror whose relative had allegedly been contacted so that the truth of that allegation could be determined, the prosecution would stipulate to excuse the juror, but the defense did not disclose the identity of that juror (fol. 156). Counsel for co-defendant Merlini joined in the motion which included a request for an adjournment in order to produce "proof of these assertions."

The prosecution pointed out that this jury list as well as other jury lists had come through "with people who have felony and misdemeanor convictions" (in violation of the Judiciary Law), and thereby agreed with the defense that some inquiry in connection with the panel was not only proper, but for the prosecution was "vital" (fol. 140); that the inquiry in connection with the panel had been completed prior to the original trial date of January 4, 1960, at which time defense counsel apparently had this matter fully in mind, since reservation was made of all rights for motions "directed to the jury"; that the present motion was purportedly founded on information afforded by an unnamed and unidentified person, was not in affidavit form or even in writing (fol. 141), and, most importantly, that due to the vague and nebulous statements there was no fact foundation to which the prosecution could address a fact argument or to which the Court could direct its discretion (fol. 150).

The ruling of the Trial Court in denying the motion on the opening day of the adjourned trial date is set forth at folios 146, 150, and 159, the Court ruling in substance that any showing of alleged "influence", if there was such, was a proper subject of inquiry on *voir dire* examination and challenge for cause could be interposed according to the statutes so providing.

**Facts Disclosed on *Voir Dire* Examination**

On denial of the defense motions, the Trial Court permitted individual *voir dire* examination of the prospective jurors, five days being required for the swearing and examining of each prospective juror individually. Twenty peremptory challenges were available to each side.

Sixty-four jurors were examined before the prosecution and defense accepted the full panel of twelve jurors and two alternates. The People exercised twelve peremptory challenges and the defendants fourteen.

An analysis of the *voir dire* examination of each juror examined, but *not* accepted, is set forth in Chart form, Appendix "C-1," *infra*, pp. 28a-32a.

An analysis of the *voir dire* examination of the accepted jurors is set forth in chart form, Appendix "C-2," *infra*, pp. 33a-34a.

The record examination of the jurors is contained in folios 163-708, and 5551-6807. The charts in Appendices "C-1" and "C-2" analyze the pattern of the *voir dire* examination and show by category, what knowledge, if any, the individual juror had of any background inquiry, by whom the challenge was interposed and the nature of the challenge.

Some of the relevant facts disclosed by the examination, and as shown by the analysis:

1. Of the sixty-four jurors examined, eleven were acquainted with either one of the attorneys for the defendants, the defendants themselves or defendants associates;

2. Six peremptory challenges were never used by the defendants when the twelve trial jurors were accepted;

3. Only five of the prospective jurors indicated that they had any knowledge of any inquiry being made by members of the state police—one of these jurors was challenged peremptorily by the prosecution and the remaining four were accepted to serve as trial jurors by the defense, without challenge;

4. No challenge for cause was at any time interposed by defense counsel to any of the five prospective jurors examined who had directly or indirectly learned of inquiry being made by state police into their background qualifications;

5. Of the fourteen jurors discharged peremptorily by the defense, only one of the fourteen had any knowledge of any inquiry being made—by some unknown person (not state police)—of her qualifications;

6. Of the eighteen jurors excused for cause, not one was asked or knew of any inquiry in connection with his qualifications; and

7. Of the twelve jurors on the main panel unqualifiedly accepted by the defense, two did not know of any inquiry by anyone as to their qualifications (Hutchinson, Besig); three heard that some inquiry had been made about them but were never asked if they knew whether defense, the prosecution or a jury commissioner made the inquiry (Head, Eisenhut, O'Neil); two learned that some inquiry had been made but didn't know my whom (Basile, Kane); one was never asked if any inquiry had been made (Regan); and four heard indirectly that some inquiry had been made about them by state police officers (Ledwith, Maloy, Oertel, Keating).

It will be noted that in the initial motion by defense counsel, Appendix A, *infra*, concern was expressed about

inquiring of jurors on *voir dire* of any alleged inquiry into their background qualifications (fol. 148). This concern, however, was apparently not maintained through the examination, for defense counsel, instead of inquiring generally of the jurors whether they had knowledge of any inquiry by *anyone* (since defense counsel never questioned the propriety of undertaking such inquiry, fol. 143) the questions to jurors were framed specifically as to whether inquiry was made, for example, by "members of the state police department" (fol. 5826) or "state troopers" (fol. 5884).

**Reason Disclosed for Acceptance of the Jury Without Challenge**

It is apparent from the issues raised prior to trial, that the experienced defense counsel had undertaken their own inquiry prior to *voir dire* of the prospective jurors (as is customary) and were satisfied with the jurors chosen—expressing their satisfaction by accepting them. As noted above, counsel carefully framed their choice of language on *voir dire* and consciously *failed* to challenge any juror for cause. The tactics of the defense became apparent on summation.

Counsel for defendant Merlini summed up first and compared this "investigation of our jury by men in uniform" [and they were not] to "the propogation (*sic*) of the Russians, the inquisition of the Spanish, the trials of Fidel Castro * * *"

Counsel for petitioner alleged in his summation that the original inquiry in connection with the jurors chosen was designed solely to coerce the trial jury into returning a guilty verdict and, with this in mind, he challenged the jury to do otherwise. The comments of petitioner's trial

counsel on this issue are contained in the record (fols. 5031-5037). That defense counsel carefully designed both *voir dire* examination and the unqualified acceptance of four of the five jurors (the fifth having been peremptorily challenged by the prosecution) who had indirect knowledge of any inquiry by the prosecution concerning them is readily apparent in his comments on summation picturing the jury as "the victims of [coercion] just the same as these defendants are the victims of it" (fol. 5037).

### Verdict of the Trial Jury

That the Trial Jury was under no strain of coercion or intimidation, that they were quite unbiased and impartial, that there was no (in defense counsel's language) "prostituting of the jury system" is best exhibited by the split verdict of the jury—acquittal for co-defendant Merlini, conviction for petitioner Bollettieri.

### D. Facts Surrounding the Mistrial Motion Based on the Cross Examination of Defense Witness, Chapman A. Thomas

Prior to trial, an original motion had been made in the Appellate Division, Fourth Department, on behalf of petitioner for examination of Grand Jury Minutes preparatory to a motion to dismiss the indictment. In support of this motion, an affidavit was submitted by Mr. Pawlinga, co-counsel for petitioner, setting forth the substance of alleged interviews with various of the individuals involved, including Merlini, Padula, Bouse, Belmont and Thomas. When Thomas was called as a witness for the petitioner (fol. 3457), he testified in general terms concerning the practices of the Department of Public Works in connection with office practices in preparing requisitions for material needed by the Department and the handling of invoices

and purchase orders by him which would tend to exculpate the petitioner. During his direct examination by counsel for petitioner, the following colloquy occurred:

> "Question: I see. Now, Mr. Thomas, did you testify before the grand jury in connection with this matter?
> Answer: Not before the grand jury, no.
> Question: Well, did you testify then before the Attorney General on Hopper Street relative to this?
> Answer: I did.
> Question: And, that, of course, was some time previous to the present time?
> Answer: Yes." (fols. 3510-3511).

The obvious purpose and result of this direct testimony was to create the inference that Thomas' testimony was intentionally withheld from the Grand Jury and from the Trial Jury up to that time although fully known to the Attorney General's office; that Thomas had not been called before the Grand Jury to testify concerning these matters but had testified fully when *privately* examined at the Attorney General's office.

The previous affidavit of Mr. Pawlinga to the Appellate Division, however, disclosed not only that Thomas had been called before the Grand Jury, but that this was known to petitioner's counsel.

Paragraph 16 of Mr. Pawlinga's affidavit stated:

> "That your deponent spoke with Chapman Thomas, bookkeeper in the Department of Public Works, who advised deponent that he had been subpoenaed to the Grand Jury and testified as to four requisitions which were attached to the supposedly fraudulent vouchers and purchase orders attached hereto. The said Chapman Thomas advised that it was his belief that one, Frank Garcea, a foreman in the Department of Public Works, had caused said requisitions to be issued by said Chapman Thomas for materials. That at no

time was Thomas asked whether Joseph Bollettieri did cause said requisitions to be issued. That Thomas stated that he could not identify the signatures on the pink slips and/or purchase orders."

The full extent of cross examination by respondent on this issue is contained in Appendix "D", *infra*, pp. 35a-41a. A reading of the testimony shows that the People attempted to dispel the inference cast by counsel for the petitioner on direct examination and to demonstrate:

1. That the witness Thomas had not testified fully, as inferred, before the attorney general's office; and

2. That the witness Thomas had indeed been called before the Grand Jury in an attempt to present his testimony to that body, but upon the advice of Mr. Pawlinga, who was both his counsel and the counsel for the petitioner, Thomas refused to testify.

If will be noted that the key question involved as to claim of privilege against self-incrimination (fol. 3602) was never answered after objection was made by Mr. Shanahan; that the question itself was subsequently withdrawn after argument in Chambers (fol. 3609); and the question was never again alluded to after defense counsel pointed out in Chambers that such cross examination might be error. In presenting argument as to propriety of the question in Chambers, petitioner's counsel cited a recent decision of the Appellate Division (fols. 3645-3704), *People* v. *Ashby*, 9 A. D. 2d 464, 195 N. Y. S. 2d 301, which case was thereafter reversed by the Court of Appeals in 8 N. Y. 2d 238, 203 N. Y. S. 2d 854. However, in view of the language of the Appellate Division decision, the People withdrew the question and pursued the issue no further on examination or summation. Defense counsel, however, after having the mistrial motion

denied, specifically rejected any request that the Court admonish the jury in connection with the unanswered question (fols. 3702-3703).

**Defense Examination of a Prosecution Witness**

While complaining of the cross examination by the People of a defense witness, petitioner's counsel had examined one of the People's witnesses (and properly so) in much the same manner.

When the People first presented their chief prosecution witness (Dominick Padula, the D. P. W. employee who had done the work on petitioner's home), all verbatim minutes of the witness' appearances before the Grand Jury and four appearances before the Attorney General's office were turned over to the defense, without prior demand (fols. 880-882).

On cross examination, trial counsel for petitioner examined the witness Padula at length concerning his constitutional claim of privilege against self-incrimination and the subsequent grant of immunity to him by the Grand Jury (fols. 1247-1249). Defense counsel also cross examined the witness concerning his prior testimony, using the minutes previously afforded by the prosecution (fols. 1255-1266). On re-direct examination, the prosecution was then permitted to explain the circumstances surrounding the claim of privilege by the witness Padula and grant of immunity (fols. 1327-1364) which included the witness' connection, not only with the petitioner Bollettieri, *but also with Mr. Pawlinga* who had instructed Padula when he appeared before the Grand Jury, not to answer any questions and to claim his privilege against self-incrimination (fol. 1350).

On re-cross examination, defense counsel then pursued this claim of privilege and grant of immunity in even greater detail (fols. 1409-1414; 1434-1436).

Petitioner's present complaint is that his motion for mistrial should have been granted, even though the same course of examination, and properly so, had been employed by his own counsel in the examination of a prosecution witness.

## ARGUMENT

### I. Concerning the motion for discharge of the jury panel.

**The New York statutory scheme afforded petitioner any redress of supposed grievances.**

The statutory scheme provided in New York State for selection of jurors in criminal matters is set forth in Chapter III of the Code of Criminal Procedure, §§ 359-387 (all of these sections are reprinted in Appendix "A", *infra*, 1a-16a). By statute, challenges are divided into those directed to the panel or to an individual juror (§ 359). Challenge to the panel can be founded only upon material departure from the requirements of the Judiciary Law (to be noted below) prejudicial to the defendant (§ 362, *People* v. *Kruger*, 302 N. Y. 447, 99 N. E. 2d 233). Such challenge must be taken before a juror is sworn, be in writing, and distinctly specify the grounds of challenge (§ 363). None of these requirements were fulfilled or even attempted in the "motion" at issue, nor would the defense disclose the source of their information or the juror or jurors of whom they were concerned.

Challenge to the individual juror may be only for cause or peremptory (§ 370) and although it must be taken when the juror is called and before he is sworn, the Court is

specifically given discretion to set aside a juror "for good cause shown" before evidence is given (§ 371).

The general and particular challenges for cause to a juror are set forth in § 374, with the general cause detailed in § 375 and the particular causes in § 376. In the instant case, a challenge for *actual bias* (§ 376) would have been proper if the defense felt that inquiry into juror qualifications constituted "coercion", *Cf., People* v. *O'Keefe*, 281 A. D. 409, 120 N. Y. S. 2d 349 at 354 (Third Dep't. 1953), *aff'd.* 306 N. Y. 619, *Cert. Den.* 347 U. S. 989. If not satisfied, the defendant could have tried the challenge under the procedure set forth in §§ 381-384, inc., and could then have produced any affidavits or witnesses desired. No challenge was made or trial of challenge had; known challenges for cause can be waived, *People* v. *O'Keefe, supra.*

> "If it was the defendant's claim that, as a result of the episode, the juror was disqualified or unfit, it was their duty to present that claim then and there, at that stage of the proceedings. They could not, by any reservation, preserve the objection for use at a later stage" (*People* v. *O'Keefe, supra*, 120 N. Y. S. 2d at 324).

As was further stated in the *O'Keefe* decision: "having elected to retain the juror after having been fully advised of the facts, they no longer had any right to object to her presence on the jury" (120 N. Y. S. 2d at 354, 355). As in the *O'Keefe* case, the petitioner herein attempted to have his "cake and eat it too" but in doing so, as the Appellate Division suggested in *O'Keefe*, he "harbored an illusion and no acquiescence by the Court could give it reality" (120 N. Y. S. 2d at 355).

**There is no conflict with federal decisions on this issue.**

In a comparable situation, where a United States Attorney had inspected the income tax returns of prospective jurors prior to trial, the Second Circuit affirmed the denial of a motion for a new trial in *United States* v. *Costello*, 255 F. 2d 876 (C. A. 2d 1958), cert. den. 357 U. S. 937, pet. for rehearing den. 358 U. S. 858, and declared as a matter of policy in this case of first impression in the Federal courts:

> "Appellant further claims that the practice is against public policy in that, once it becomes generally known, prospective jurors will be intimidated or will attempt to avoid jury duty. These, we incline to believe, are far-fetched bogies. Prospective jurors whose returns are vulnerable are the very ones whose elimination is facilitated by the practice: Knowledge by the others that they were found acceptable to the government, even after an inspection of their returns would hardly be conducive to their intimidation. And the argument that the practice will tend to discourage cheerful jury service, if of any force at all in view of the mandatory nature of such service, would seem not to apply to those having made honest tax returns. There would seem to be no good reason to believe that knowledge that jury service entails exposure of one's tax return to the scrutiny of a district attorney would deter a good citizen from service in the judicial establishment any more than the fierce publicity which beats upon the private affairs of a citizen appointed to high office in the executive department deters acceptance of such appointment" (*United States* v. *Costello*, 255 F. 2d at 883).

The method for selecting jury panels in Oneida County is set forth in the Judiciary Law of the State of New York (relevant sections reprinted in Appendix "A", *infra*, pp. 1a-16a). Qualifications are set forth in § 662, the jurors' questionnaire in § 661, disqualifications in § 664, exemptions in § 665, and the ineligibility of jurors in § 665-a.

By § 657 of the Judiciary Law, the jury commissioner is empowered to "make inquiries" anywhere within the county to determine qualification and by § 659 is required to examine into prospective juror's fitness. Among other required qualifications, § 662 of the Judiciary Law states that each juror must:

> "Subd. 4—be in possession of his natural faculties and not infirm or decrepit.
>
> Subd. 5—not have been convicted of a felony or of a misdemeanor involving moral turpitude.
>
> Subd. 6—be of sound mind and good character; of approved integrity; of sound judgment; and able to read and write the English language understandably."

As indicated at the time of presentation of this motion below (Appendix "B", *infra*, pp. 17a-27a) in each of the prior jury panels (and including the instant panel), jurors were called to serve who had been convicted of felonies or misdemeanors involving moral turpitude (fol. 140). Despite subdivision 5 of § 662 and questions 15 and 16 of the "Form of Questionnaire" proposed in § 661 of the Judiciary Law (in connection with prior convictions) the fact of such criminal records was learned solely through investigation regularly conducted prior to selection of the trial or grand jury being chosen. In addition, as ultimately disclosed on *voir dire*, ten (or twenty percent) of the fifty unaccepted jurors were acquainted with a defendant, defense counsel or associate of defendants.

Those qualifications required by subdivision 6 of § 662 (sound mind, good character, approved integrity, sound judgment) could be learned only through independent general character inquiry customarily (as the defense conceded, fol. 133) made in cases of this type.

Petitioner, however, presently alleges that more than the method of inquiry conducted was prejudicial *per se*. In the present petition—as in the motion for amendment of the remittitur—petitioner suggests that the inquiry is of a prejudicial nature "because it was an unauthorized and prohibited official intrusion into the privacy of the jury, and presumptively prejudicial, particularly since the qualifications of its members had already been determined by the only agent of the government authorized to make such a determination prior to the *voir dire* examination" (p. 25 of Petition). The difficulty with petitioner's position is that he attempts to thereby construe the sections of the Judiciary Law relating to the commissioner of jurors as prohibitory in nature when in fact those sections relied on by petitioner describe merely the *powers* and *duties* of the commissioner of jurors. As noted above, petitioner's trial counsel himself agreed that an inquiry into such qualifications is proper (p. 5 of Petition). The original motion attacked only the alleged manner of conduct of such inquiry, and it was then and is now apparent that the defense conducted its own inquiry.

In support of his position, the petitioner relies on *Gold* v. *United States*, 352 U. S. 985; *Remmer* v. *United States*, 350 U. S. 377, and *Sinclair* v. *United States*, 279 U. S. 749.

In the *Gold* case (cited by defendant for the proposition that an indirect contact with a juror can result in prejudice), an F. B. I. agent made contacts with *members of the jury* or their families *during the course of the trial*, coincidently *on a matter identical to the charge defendants were being tried upon*. The specific inquiry made by the F. B. I. centered around an investigation of perjury in the filing of a non-Communist affidavit. The jurors were sitting in a case involving the identical type of perjury.

The F. B. I.'s investigation of the unrelated, but identical, perjury was to determine whether jurors or their families had received certain "propaganda literature". This personal contract, made *during* the course of the trial, *could* tend to lead the jurors who learned of such investigation to conclude that an attempt was made to influence their judgment. This conceivably could result in prejudice to those defendants.

*Remmer* v. *United States, supra*, and *Sinclair* v. *United States supra*, are also distinguishable on their facts. In *Remmer a direct contact was made* WITH A JUROR *during the course of trial and such contact concerned the subject matter of the trial.* In *Sinclair, after* the trial jury was completed and during the trial of the issues, the individual jurors were "shadowed" and kept under constant surveillance in an apparent attempt to obtain indirect contact. The language of *Remmer* is particularly illuminating in this respect:

> "In a criminal case, any private communication, contact, or tampering, directly or indirectly *with a juror during a trial* about the matter pending before the jury is for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the party * * * *Mattox* v. *United States*, 146 U. S. 140, 148-150; *Wheaton* v. *United States*, 133 F. 2d 522, 527." (Emphasis supplied)

**There is no substantial federal constitutional issue involved in this case.**

It is well-settled that the Fourteenth Amendment to the Constitution of the United States does not guarantee the right to a jury trial in a State prosecution, *Fay* v. *New York*, 332 U. S. 261, *Palko* v. *Connecticut*, 302 U. S. 319,

and cases cited therein. The right to a jury trial, however, *is* guaranteed by Art. I, Section 2, of the New York State Constitution.

Reference is made to these basic principles only because petitioner attempts to convey the impression that his right to a trial by jury originates from the Federal Constitution and, therefore, any question with regard to the choosing of that jury automatically raises a *substantial* federal question. It is worthy of observation that for the first time, and upon the application for re-argument, before the Court of Appeals, the defendant claimed a violation of his rights under the Federal Constitution.

Inasmuch as defendant is unable to rely upon the Fourteenth Amendment to the Federal Constitution as the source of his right to a jury trial, it becomes his burden to establish that the method of inquiry utilized by the People resulted in a trial "so unfair as to amount to a taking of [the defendant's] liberty without due process of law," *People* v. *Fay*, 332 U. S. at p. 296.

*People* v. *Fay, supra,* held that special or so-called "blue ribbon" juries, picked to hear unusual and complicated cases, did not violate Amendment Fourteen of the Federal Constitution guaranteeing individuals due process and equal protection of the law. The defendant's contention in the *Fay* case was that the special jury was more inclined to convict than the ordinary juries drawn from the regular panel of veniremen. The Supreme Court rejected the defendant's argument and found no statistical proof that the special juries had such inclination. In addition, *the Court looked to the actual functioning of the jury and considered the verdict* in its determination as to whether the defendant had a fair trial under the Fourteenth Amendment. At page 282, of 332 U. S. the Court stated:

"It is not easy, and it should not be easy, for defendants to have proceedings set aside and held for naught on constitutional grounds when they have accepted as satisfactory all of the individual jurors who sat in their case; the jury exercised such discriminating and dispassionate judgment as to acquit them on three of the five counts submitted, and their conviction on a full judicial review of the facts and law has been found justified. This court has long dealt and must continue to deal with these controversies from state courts with self-imposed restraints intended to protect itself and the state against irresponsible exercise of its unappealable power."

This language is particularly pertinent to the instant case in that defendant is complaining of a verdict which he feels was brought about by "coercion and intimidation" which resulted in a jury tending to convict. Applying the same rule of reason as the Supreme Court applied in the *Fay* case when examining the actual verdict of the jury, the acquittal of the defendant Merlini— *and the acceptance of jurors without challenge for cause*—conclusively demonstrate that the defendant received the fair trial required by the Fourteenth Amendment to the Federal Constitution.

It is of further significance in the *Fay* case, that the Supreme Court considered its previous decision involving questions concerning juries in *Federal* courts as inapplicable to a jury drawn for a *State* Court.* With reference to federal control or supervision over state juries, the Supreme Court stated at page 287 of 332 U. S.:

* The decisions rejected by the Supreme Court in its considerations were *Glasser* v. *United States*, 315 U. S. 60; *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217; *Ballard* v. *United States*, 329 U. S. 187. As a general proposition these decisions held that the systematic exclusion of certain classes of jurors did not conform to the traditional requirements of a jury trial. The question, therefore, as to what constitutes requirements for a jury trial is necessarily left to the state to determine.

> *"Over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in state courts, and these expressions of policy are* NOT NECESSARILY *embodied in the concept of due process."*

It is no coincidence that every case urged upon this Court on the appeal and in the present application is a *federal case concerning a federal jury.* Such a circumstance is indicative that the type of procedure complained of has not been considered a constitutional issue under the Federal system.

**II. Concerning the motion for mistrial based on the cross examination of defense witness Thomas.**

**There is no conflict with federal decisions on this issue.**

Federal decisions concerning the examination of a witness concerning a prior claim of privilege against self-incrimination have been considered by this Court as being proper or not proper depending on inconsistency or otherwise with prior testimony, such factor being controlled by this Court in its supervisory power over the administration of *federal* criminal justice. See, *e.g., Grunewald* v. *United States,* 353 U. S. 391. A subsequent decision in the federal court system, which is almost on "all fours" with the instant case, is *United States* v. *Sing Kee,* 250 F. 2nd 236 (2nd C. C. A. 1957) cert. den. 355 U. S. 954. In that case, a witness called by the defense was examined on direct in part:

> "Q. By the way, Mr. Waterman, were you a witness before the Grand Jury?
> A. I was, sir.
> Q. And did you give the Grand Jury the same testimony that you are giving us here, substantially?

A. Well, if I was asked the same questions.
Q. Was the testimony true that you gave the Grand Jury?
A. As far as I know, yes, sir."

When cross examination was then permitted concerning a prior claim of privilege before the Grand Jury, the Appellate Court held:

> "The answers given by the witness were factually accurate, but they were capable of a much broader interpretation. The defendant would have had the jury believe that Waterman had been a cooperative and candid witness before the Grand Jury, thereby bolstering his credibility. *Having brought the conduct of the witness before the Grand Jury into issue, the defendant cannot now complain that the Government was permitted to develop all that happened so as to rebut an inference which was contrary to fact.* The rule enunciated in *Grunewald* was intended to implement the constitutional guarantee against self-incrimination; *it was not intended to permit a defendant to draw out part of the facts from a witness while foreclosing the Government on cross examination from developing all the facts so that the partial account is not misleading.*" (Emphasis supplied.)

As noted above, in the case at bar, petitioner's counsel also attempted to draw inferences from testimony of the witness on direct examination as to prior testimony before the Grand Jury or the Attorney General's office. And, as in the *Sing Kee* case, (cited with approval by the Court of Appeals of the State of New York in *People* v. *Ashby*, *supra*), the People were then permitted to develop those facts so that the partial account as given was not misleading to the jury.

**There is no substantial federal constitutional issue involved.**

As to the present claim that a privilege against self-incrimination is a matter of *federal* constitutional right under the XIV Amendment (as opposed to being purely a *state* right), respondent will restrict argument to citations and quotations from the recent decision of this Court in *Cohen* v. *Hurley*, ____ U. S. ____, 81 S. Ct. 954 (April 24, 1961). Cases cited include: *Twining* v. *New Jersey*, 211 U. S. 78, *Snyder* v. *Com. of Massachusetts*, 291 U. S. 97, *Brown* v. *Mississippi*, 297 U. S. 278, *Palko* v. *Connecticut*, 302 U. S. 319, *Adamson* v. *California*, 332 U. S. 46 and *Knapp* v. *Schweitzer*, 357 U. S. 371.

On *dissimilar* facts, the majority of this Court pointed out in footnote 8 (81 S. Ct. 961) that "if any 'constitutional privilege against self-incrimination' has here been made a 'phrase without reality' it can only have been a state privilege which this court does not have jurisdiction to protect."

This Court, however, did draw a tentative line of demarcation:

> "This is not to say, of course, that states have free reign either in the choice of means of forcing incriminating testimony, or in the drawing of inferences from a refusal to testify on grounds of possible self-incrimination, no matter how objectionable or irrational. *But these decisions do establish, at the very least, that to make out a violation of the Fourteenth Amendment, something substantially more must be shown than that the state procedures involved have a tendency to discourage the withholding of self-incriminatory testimony.*" (81 S. Ct. 961, emphasis supplied.)

In accordance with this latter admonition, it is obvious that in the case at bar there is no substantial showing, or showing of any sort, concerning any massive discourage-

ment of the withholding of self-incriminatory testimony, but rather, in line with *U. S.* v. *Sing Kee, supra,* the prosecution merely went into the door that had been opened by trial counsel for petitioner.

## Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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# APPENDICES

# APPENDIX A

CONSTITUTION OF THE UNITED STATES

Amendment XIV

Section 1. • • • nor shall any State deprive any person of life, liberty, or property, without due process of law. • • •

NEW YORK JUDICIARY LAW

(McKinney's Consolidated Laws of New York—1960 "Pocket Part")

Section 657. *Specific powers and duties of commissioner*

• • • In accordance with the law and the rules adopted pursuant thereto, each commissioner shall

(1) determine the competence, qualifications, eligibility and liability of individuals for jury service, and make inquiries and conduct examinations of persons as to themselves, and if necessary as to others, anywhere within the county • • •

Section 659. *Examination as to fitness*

No person's name shall be entered on a jury ballot or list unless he has stated to the commissioner, in a certificate or questionnaire pursuant to section twelve hundred thirty-two-a of the penal law, his qualifications in writing in his own hand and has signed such certificate or questionnaire.

In order to ascertain a juror's qualifications, the commissioner may either

(1) mail to the prospective juror a questionnaire form on which to enter the name, address, occupation, claims for exemption and such other questions as the law may require, which the person to whom the ques-

tionnaire is mailed must fill out in his own hand, sign and return within one week to the commissioner; or

(2) summon the prospective juror to appear before him for the purpose of filling out the questionnaire and testifying as to the competence, qualifications, eligibility and liability of himself or any other person to serve as a juror and to present claims for exemption or disqualification. Such person shall not be entitled to any fee or mileage when responding for such purpose. Such summons may be served personally or by leaving it at the person's residence or place of business with a person of suitable age and discretion, or by mail. If served personally or by substitution the summons shall require the person summoned to attend not less than three days after service. If served by mail the summons shall require the person summoned to attend not less than five days after the mailing thereof.

One or more successive summonses may be served upon the same person when he fails to attend as required by a former summons. When a person has so attended twice and furnished all information required, he shall not be required to attend again for one year thereafter.

The commissioner may, in his discretion, dispense with examination of the person so notified where another person cognizant of the facts is produced and testified in his stead and it appears from the testimony of such other person that the person notified is disqualified, not qualified or exempt.

The commissioner may, in his discretion, forward to any appropriate police authorities, within the county for checking against the records of such authorities, the names of any or all persons found otherwise qualified by him for jury service.

Notwithstanding the foregoing provisions of this section, the justices of the appellate division may by rule

*Appendix A*

require that, in any county contained within their respective departments,

(a) the questionnaires required in accordance with option numbered (1) above shall be filled out in the prospective juror's own hand, signed and returned to the commissioner,

(b) each prospective juror shall be personally examined by the commissioner,

(c) the names of prospective jurors found otherwise qualified shall be forwarded by the commissioner to the appropriate police authorities within the county for checking against the records of such authorities.

Section 661. *Form of questionnaire*

The questionnaire to be filled out by prospective jurors shall contain the substantially following information and shall be in such form as the commissioner may prescribe.

| | |
|---|---|
| Qualifications to Serve as Juror<br>To be Filled Out in Own Handwriting | Date Result By Whom Examined<br>Do not write in this box |
| The undersigned certifies to the following answers | (Explanations or remarks) (concerning answers may) (be made in ruled box on) (reverse side ): |

A person who knowingly makes a false statement of a material fact in these certificates is guilty of a misdemeanor, punishable by fine or imprisonment.

1 Print name in full .....
First Name Middle Name Last Name

2 Date of birth .....
Mo. Day Year

3 Residence ..... Street ..... City .....
Town or Village ..... Tel. No. .....

*Appendix A*

4 How long living at present address .....
How long in N. Y. State ..... In County .....

5 Give any other name you have used or been known by .....

6 Place of Birth ..... (City) (State) If not American born, how became citizen ..... When naturalized ..... Where .....

7 Education: Primary, High School, College, degrees, special studies, etc. .....

8 Occupation ..... Employed at present .....
Business address ..... P. O. Zone No. .....
Tel. No. .....

9 Firm name of employer .....
How long in present employment .....

10 What other employment during past six years .....

11 Wife's name ..... Her occupation .....
Her firm ..... Her business address .....

12 Do you or your wife own property (such as bank account, furniture, insurance, trust funds, stocks, bonds, mortgages, land, etc.) worth $250 .....

13 Ever served as a juror .....

14 Are you physically disabled or incapacitated .....
Is your hearing or eyesight so impaired that you could not intelligently follow a case in court .....

15 Ever had a motor vehicle license revoked or suspended ..... Ever been convicted of a criminal charge .....

16 If your answer to any question on lines 14 or 15 is "Yes", give all particulars .....

17 Any judgments outstanding against you .....
Nature of action in which obtained .....

*Appendix A*

18 Have you such views concerning the death penalty as would prevent you from finding a defendant guilty if the crime charged be punishable by death .....

19 In what months of the year between September 1 and June 30 would you prefer to serve (Name two or more months) .....

THE MAKING OF A FALSE STATEMENT OF A MATERIAL FACT IN THIS QUESTIONNAIRE IS A MISDEMEANOR, PUNISHABLE BY FINE AND IMPRISONMENT

The foregoing answers are true in all respects

Sign here .....

Do not write below this line

N R O B D

A PERSON WHO KNOWINGLY MAKES A FALSE STATEMENT OF A MATERIAL FACT IN THIS QUESTIONNAIRE IS GUILTY OF A MISDEMEANOR, PUNISHABLE BY FINE OR IMPRISONMENT

I, ..... do hereby certify: I do not dwell or lodge nor do I have or maintain a dwelling or lodging in the County of ..... for the greater part of the time between the first day of October and the thirtieth day of June next thereafter, and I am not a resident of said County; but I reside permanently at ..... ..... City of .....

Explanation of any answers on opposite side of this form, or remarks, may be made here

*Appendix A*

County of ....., State of ....., and have resided there since .....
Examined ..... 19...
by .....
I, ..... do hereby certify:
I am entitled to and ) claim exemption )
) from do-
I am disqualified ) ing jury service for the following reason .....
.....
.....
Examined ..... 19...
by .....

Section 662. *Qualifications of jurors*

In order to be qualified to serve as a juror, a person must:

1. Be a citizen of the United States, and a resident of the county.

2. Be not less than twenty-one, nor more than seventy years of age.

3. Be the owner, in his or her own right, of real or personal property of the value of two hundred and fifty dollars; or the husband of a woman or wife of a man who is the owner, in his or her own right, of real or personal property of that value.

4. Be in the possession of his natural faculties and not infirm or decrepit.

5. Not have been convicted of a felony or of a misdemeanor involving moral turpitude.

6. Be of sound mind and good character; of approved integrity; of sound judgment; and able to read and write the English language understandably.

*Appendix A*

A person dwelling or lodging or having or maintaining a dwelling or lodging in a county for the greater part of the time between October first and June thirtieth next thereafter, or a resident therein more than six months of the year, is a resident of that county, within the meaning of this section.

Section 664. *Disqualifications*

Each of the following officers is disqualified to serve as a juror:

1. Any duly elected federal, state, city, county, town or village official.

2. The comptroller; the attorney-general; the head of a civil department or the head and members of a board, council or commission which is the head of a civil department of the federal, state, city, county, town or village government; members of the state tax commission; members of the state commission of correction; members of the state industrial board; members of the public service and transit commissions; the commissioner of education; the commissioner of agriculture and markets; the commissioner of social welfare; the deputy of each officer specified in this subdivision; the secretary to the governor.

3. A member of congress or of the legislature or of any local legislative body.

4. A judge of a court of record, or not of record, or a surrogate.

5. A sheriff, under sheriff, or deputy sheriff regularly engaged in the performance of his duties.

6. The clerk or deputy clerk of any court.

No public officer or employee of the United States government, or of any state, city or municipality, or of any political subdivision of any of them or of any official board, authority, council, commission, corporation, or other agency of any of them, receiving annual

compensation in excess of one thousand dollars from the aforesaid sources, shall serve on any grand jury.

Section 665. *Exemptions*

Each of the following persons only, any inconsistent provision of law to the contrary notwithstanding, although qualified, is entitled to exemption from service as a juror upon claiming exemption therefrom:

1. A clergyman or minister of religion officiating as such and not following any other calling.

2. A practicing physician, surgeon, or dentist having patients requiring his daily professional attention, a licensed pharmacist actually engaged in his profession as a means of livelihood, a duly licensed embalmer actually engaged in his profession as a means of livelihood, and an optometrist actually engaged in the practice of optometry.

3. An attorney or counsellor at law regularly engaged in the practice of law as a means of livelihood.

4. [See also subd. 4 below] A person belonging to the armed forces of the United States, and the active national guard and naval militia of the state.

4. [See also subd. 4 above] An active member of the army, air force, navy or marine corps of the United States, and the active national guard and naval militia of the state. Amended L. 1955, c. 797, § 3, eff. July 1, 1955.

5. A member of a fire company or department or police force or department duly organized according to the laws of the state or any political subdivision thereof and performing his duties therein, or an exempt volunteer fireman, as defined in section two hundred of the general municipal law.

6. A captain, engineer, or other officer, actually employed upon a vessel making regular trips; or a licensed pilot actually following that calling.

7. A woman.

8. An editor, editorial writer, a sub-editor, reporter or copy reader, actively and regularly employed in the handling or gathering of news for a daily, semi-weekly or weekly newspaper.

Section 665-a. *Ineligibility of jurors*

The following persons shall be ineligible to serve as jurors: Any person who is knowingly a member of the communist party or any party or organization which advocates, advises or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States, the government of any state, territory, district or possession thereof, or of any political subdivision therein, by force or violence, or who refuses to take the oath as provided by this law.

NEW YORK CODE OF CRIMINAL PROCEDURE
(McKinney's Consolidated Laws of New York)

*Chapter III—Challenging The Jury*

Section 359. *Definition and division of challenges*

A challenge is an objection made to trial jurors, and is of two kinds:

1. To the panel;

2. To an individual juror.

Section 360. *When there are several defendants, they must unite in their challenges*

When several defendants are tried together they cannot sever their challenges, but must join therein.

Section 361. *Challenge to the panel, defined*

A challenge to the panel is an objection made to all the trial jurors returned and may be taken as well

to the panel returned for the term, as to an additional panel ordered to complete the jury.

Section 362. *Ground for challenge to panel*

A challenge to the panel can be founded only on a material departure, to the prejudice of the defendant, from the forms prescribed by the judiciary law, in respect to the drawing and return of the jury, or on the intentional omission of the sheriff, or in the City of New York, the county clerk of the county to summon one or more of the jurors drawn.

Section 363. *When and how taken*

A challenge to the panel must be taken before a juror is sworn, and must be in writing, specifying distinctly the facts constituting the ground of challenge.

Section 364. *If sufficiency of the facts be denied, adverse party may except. Exception, how made and tried*

If the sufficiency of the facts alleged as a ground of challenge be denied, the adverse party may except to the challenge. The exception need not be in writing, but must be entered upon the minutes of the court; and thereupon the court must proceed to try the sufficiency of the challenge, assuming the facts alleged therein to be true.

Section 365. *If exception overruled, court may allow denial of challenge. If allowed, may permit challenge to be amended*

If, on the exception, the court deem the challenge sufficient, it may, if justice require it, permit the party excepting, to withdraw his exception, and to deny the facts alleged in the challenge. If the exception be allowed, the court may, in like manner, permit an amendment of the challenge.

*Appendix A*

Section 366. *Denial of challenge, how made, and trial thereof*

If the challenge be denied, the denial may, in like manner, be oral, and must be entered upon the minutes of the Court; and the Court must proceed to try the question of fact.

Section 367. *Who may be examined on trial of challenge*

Upon the trial of the challenge, the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons, may be examined to prove or disprove the facts alleged as the ground of the challenge.

Section 368. *If challenge allowed, jury to be discharged. If disallowed, jury to be impaneled*

If either upon an exception to the challenge, or a denial of the facts, the challenge be allowed, the court must discharge the jury, so far as the trial of the indictment in question is concerned. If the challenge be disallowed, the court must direct the jury to be impaneled.

Section 369. *Defendant to be informed of his right to challenge an individual juror*

Before a juror is called, the defendant must be informed by the court or under its direction, that if he intend to challenge an individual juror, he must do so when the juror appears, and before he is sworn.

Section 370. *Kinds of challenge to individual juror*

A challenge to an individual juror may be taken either by the people or by the defendant, and is either

1. Peremptory, or
2. For cause.

*Appendix A*

Section 371. *Challenge, when taken*

A challenge must be taken when the juror appears, and before he is sworn; but the court may, in its discretion, for good cause, set aside a juror at any time before evidence is given in the action.

Section 372. *Peremptory challenge*

A peremptory challenge is an objection to a juror, for which no reason need be given, but upon which the court must exclude him.

Section 373. *Number of peremptory challenges*

Peremptory challenges shall be allowed to the following number:

1. If the crime charged be punishable with death, thirty for the regular jury; and three for each alternate juror;

2. If punishable with imprisonment for life, or for a term of ten years or more, twenty for the regular jury; and two for each alternate juror;

3. In all other cases, five for the regular jury; and one for each alternate juror.

Peremptory challenges for alternate jurors shall be computed separately, and shall be in addition to the number of peremptory challenges actually taken, and not the maximum number of such challenges herein permitted to be taken, in obtaining the regular jury.

Section 374. *Definition and kinds of challenge for cause*

A challenge for cause is an objection to a particular juror, and is either,

1. General, that the juror is disqualified from serving in any case; or

2. Particular, that he is disqualified from serving in the case on trial.

Section 375. *General causes of challenge*

General causes of challenge are,

1. A conviction for a felony;

2. A want of any of the qualifications prescribed by the judiciary law, to render a person a competent juror.

Section 376. *Particular causes of challenge*

Particular causes of challenge are of two kinds:

1. For such a bias, as, when the existence of the facts is ascertained, does in judgment of law disqualify the juror, and which is known in this Code as implied bias;

2. For the existence of a state of mind on the part of the juror, in reference to the case, or to either party, which satisfies the court, in the exercise of a sound discretion, that such juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this Code as actual bias. But the previous expression or formation of an opinion or impression in reference to the guilt or innocence of the defendant, or a present opinion or impression in reference thereto, is not a sufficient ground of challenge for actual bias, to any person otherwise legally qualified, if he declare on oath, that he believes that such opinion or impression will not influence his verdict, and that he can render an impartial verdict according to the evidence, and the court is satisfied, that he does not entertain such a present opinion or impression as would influence his verdict.

Section 377. *Grounds of challenge for implied bias*

A challenge for implied bias may be taken for all or any of the following causes, and for no other:

*Appendix A*

1. Consanguinity or affinity within the ninth degree, to the person alleged to be injured by the crime charged, or on whose complaint the prosecution was instituted, or to the defendant:

2. Bearing to him the relation of guardian or ward, attorney or client, or client of the attorney or counsel for the people or defendant, master or servant, or landlord or tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or in his employment on wages;

3. Being a party adverse to the defendant in a civil action or having complained against or been accused by him in a criminal prosecution;

4. Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment;

5. Having served on a trial jury, which has tried another person for the crime charged in the indictment;

6. Having been one of a jury formerly sworn to try the same indictment, and whose verdict was set aside or which was discharged without a verdict after the cause was submitted to it;

7. Having served as a juror, in a civil action brought against the defendant, for the act charged as a crime;

8. If the crime charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he shall neither be permitted nor compelled to serve as a juror.

Section 378. *Grounds of challenge for actual bias*

A challenge for actual bias may be taken for the cause mentioned in the second subdivision of section three hundred and seventy-six, and for no other cause.

*Appendix A*

Section 379. *Exemption, not a ground of challenge*

An exemption from service on a jury is not a cause of challenge, but the privilege of the person exempted.

Section 380. *Causes of challenge, how stated*

In a challenge for implied bias, one or more of the causes stated in section three hunderd and seventy-seven must be alleged. In a challenge for actual bias, the cause stated in the second subdivision of section three hundred and seventy-six must be alleged. In either case, the challenge may be oral, but must be entered upon the minutes of the court.

Section 381. *Exceptions to challenge and denial thereof*

The adverse party may except to the challenge, in the same manner as to a challenge to the panel; and the same proceedings must be had thereon, as prescribed in section three hundred and sixty-four, except that, if the challenge be allowed, the juror must be excluded. The adverse party may also orally deny the facts alleged as the ground of challenge.

Section 382. *Challenge, how tried, if denied*

If the facts be denied, the challenge must be tried by the court which must either allow or disallow the same and direct an entry accordingly on the minutes. If the challenge be allowed, the juror must be discharged.

Section 383. *Juror challenged may be examined as a witness*

Upon the trial of a challenge to an individual juror, the juror challenged may be examined as a witness, to prove or disprove the challenge; and is bound to answer every question pertinent to the inquiry therein.

Section 384. *Rules of evidence and trial of challenge*

Other witnesses may also be examined on either side; and the rules of evidence applicable to the trial of other

issues, govern the admission or exclusion of testimony, on the trial of the challenge.

Section 385 *Challenges*

Challenges to an individual juror must be taken first by the people and then by the defendant.

Section 386. *Order of challenges*

Challenges of either party must be taken:

1. To the panel.

2. To an individual juror, for a general disqualification.

3. To an individual juror, for implied bias.

4. To an individual juror, for actual bias.

5. Peremptory.

Section 387. *Jury to be sworn, &c.*

The first twelve persons who appear, as their names are drawn and called, who are approved as indifferent between the parties, and are not discharged or excused, must be sworn; and constitute the jury to try the issue.

# APPENDIX B

## Examination of Jurors

Proceedings of a trial taken before the Honorable John S. Marsh, Justice of the Supreme Court of the State of New York, and a jury, commencing on January 18, 1960, at the Court House, Rome, New York.

Appearances:

Robert E. Fischer, Esq., and Louis Casella, Esq., Special Assistant Attorney General, 21 Hopper Street, Utica, New York, Appearing for the People of the State of New York.

Paul R. Shanahan, Esq., and Stephen Pawlinga, Esq., Appearing on behalf of the Defendant Bollettieri.

Milton A. Abelove, Esq., Appearing for the Defendant, Merlini.

(Proceedings taken in the Chambers, Defendants present. Appearances same as before noted.)

The Court: Indictments nine and eleven, which have been consolidated for trial by order of the Court, People of the State of New York against Joseph N. Bollettieri and Charles G. Merlini. The defendants are present?

Mr. Shanahan: Defendants are present.

Mr. Pawlinga: Defendant Bollettieri is present.

The Court: All counsel present. This is in the matter of the People of the State of New York against Joseph N. Bollettieri and Charles G. Merlini, indictments nine and eleven consolidated for trial. Just for the record, may it appear that previous to the defendants and counsel appearing in this room on this matter, Mr. Shanahan indicated that he had in mind a motion addressed to the panel of jurors, which have been called in for this trial, and I believe with the concurrence of all counsel, it was

agreed that the matter should be heard in Chambers, out of the hearing of the jury panel. Is that correct, counsel?

Mr. Shanahan: That is correct, your Honor.

Mr. Abelove: That is correct, your Honor.

The Court: All right. Then, do you want to be heard, Mr. Shanahan?

Mr. Shanahan: Yes. If the Court please, at this time, on behalf of Mr. Bollettieri, whom I represent with Mr. Pawlinga, I would like to move for the discharge of the present panel of jurors, and for the selection of a new panel for the trial of this case upon the following grounds: It has come to my information through my associates in this matter, that apparently an investigation of these various prospective jurors now on this panel, has been made by members of the State Police, who I am informed, are connected with the office of the Special Prosecutor. It is our information that this investigation has been conducted in this manner. These troopers have gone to—in some instances, to close neighbors of the prospective jurors, and in one instance that we know of, have gone to a relative of one of the prospective jurors, and have undertaken to question the various people whom they have sought out, apparently pursuant to a prepared questionnaire, wherein they inquire concerning the juror's general reputation, his religion, whether he attends church regularly, his political views, his views with reference to Italians or people of Italian extraction, and generally, and apparently fairly thoroughly, according to our information, seek to get information in that manner concerning the prospective jurors. Now, the difficulty about that situation, first let me say, I don't question the right of anyone to investigate in a proper way a jury panel or the prospective jurors, however, when

it is done in this fashion by members of the State Police, who identify themselves as such, making inquiry of close neighbors and relatives, the information is very likely to, and in some instances we believe has, come back to the juror himself. The result of that is that the juror is by that means to some extent intimidated or is likely to be, and we feel that such a method of interrogation of neighbors, relatives, to be entirely improper, likely to put the juror into the frame of mind that they are living in some sort of a police state, and to destroy their effectiveness as fair, independent and impartial jurors.

Now, I would like to say to your Honor, that I don't make this motion without the definite belief that I am correct in my statement to you. If your Honor should see fit to hold a hearing on it, we would be willing to undertake to produce proof of these assertions. If, for instance, we could have until tomorrow morning to do so.

The Court: Mr. Fischer? Or, excuse me, Mr. Abelove.

Mr. Abelove: If your Honor please, I should like to join in Mr. Shanahan's motion in behalf of defendant Merlini and further call to the Court's attention that in one incident that has been called to my attention, several of these troopers came into a very small hamlet in our County, and operated more or less out of a hotel, so that the entire community was aware that there were a group of state officers checking jurors for this case. It was no secret, apparently around the hotel as to the objective, and any juror living in that community was certainly aware of the fact that at least in that hamlet, it had become a police state, insofar as this case is concerned.

I join with Mr. Shanahan in stating to the Court that the effect on a juror's mind after that type of investigation,

either a man in uniform or having identified himself as being a member of the State Police, can give these defendants, or at least defendant Merlini anything, but a fair trial, and I too, want to join with Mr. Shanahan in asking for a hearing on this. I think your Honor, taking what has happened here, together with your Honor's' statements when the jury panel was—when this case was adjourned some two weeks ago, if your Honor recalls at that time the last remarks made by the Court, which were, I do not question the fairness of those remarks, that dealt with anyone talking with them at that point after they have been interrogated, or neighbors have been interrogated by police, would make them feel that—well, their state of mind would not be that of a fair juror in this case.

The Court: Do you want to be heard, Mr. Fischer?

Mr. Fischer: Yes, sir. There are two immediate matters that arise in my mind, your Honor. First of all, the assertion here made, one assertion in particular made by Mr. Shanahan, where he was informed by his co-counsel and apparently was informed by somebody else about inquiries in connection with people of Italian extraction. Their feeling in that regard. I am certain, I would say that that did not occur. There is no doubt, however, and it is customary, as your Honor well knows, to check out a jury list, and in some instances, as your Honor is aware, this jury list and other jury lists have come through with people who have felony and misdemeanor convictions. So, it is vital, of course, that the jury list be checked.

Now, the other problem that is of concern to me is this; that the investigation of the jury list was completed on our part in excess of two weeks ago. As your Honor is aware, this matter has been adjourned and now, at the date that

the trial is ultimately to start, after adjourning the date when the trial is to commence at the request of defense counsel, we have no papers here of any kind, and I don't see how this could be tested in any way without papers other than statements of counsel allegedly on information afforded by somebody unnamed. So, your Honor, based on that, and these matters, none of which have ever come to my attention, I don't feel that there has been any showing made here in any sense of the word, any legal showing, and the motion should be denied.

Mr. Shanahan: Well, if I could—

The Court: Surely.

Mr. Shanahan: Just further, for the record, make this comment, your Honor, with reference to what Mr. Fischer has said. The adjournment which I think took place two weeks ago, as your Honor is aware, was, I assume, primarily based on the fact that I was then in trial in Buffalo, and my trial in Buffalo did not terminate until Wednesday evening late, of last week. So that while, whatever investigation the Prosecutor's office has seen fit to make, may well have occurred previous to that time, this is the first time that I have had an opportunity to be before the Court to raise the question that is now being raised. Now, further, let me suggest this to the Court, that while it is entirely proper, of course, for the Prosecutor, or for us, to check the prospective jurors as to previous convictions it is hardly necessary to contact their relatives and their immediate neighbors, to learn with reference to that—that normally can easily be done by a check of the proper Court records—Mr. Fischer may not see fit to take a position here as to the manner in which the investigation has been carried on, we don't question the propriety of investigating, what

we are raising is the question of the manner in which it is done. And the likelihood of prejudice to these defendants resulting from it. While the Code of Criminal Procedure requires that a challenge to the array, within the proper meaning of that term, be in writing, I can find no requirement that such a motion as this be in writing, but let me say this to the Court, that if your Honor would give us an apportunity to—to obtain some proper proof by way of affidavits, we would be glad to do that. But, we would need some time, of course, to do it.

The Court: Does counsel make any claim that any contacts were made by any representatives of the Assistant Attorney General's office with prospective jurors themselves?

Mr. Shanahan: Not so far as I know.

The Court: Is that true in your case also, Mr. Abelove?

Mr. Abelove: I know of no specific instance, your Honor.

The Court: Well then, actually, it boils down to this, doesn't it, whether these jurors have been—prospective jurors have been influenced in their minds in any way by reason of this inquiry made throughout the community or with relatives or neighbors or some other individuals, who might have some acquaintanceship with them, and also, whether as the result of those contacts with others, contacts in turn were made by those people with these prospective jurors. It occurs to the Court that if any—any influences of any kind were brought to bear, or were felt by any of these prospective jurors, that of course is a proper subject of inquiry by counsel in their examination of the individual jurors. It seems to me that that examination would give full opportunity to any of the parties to ascertain whether the juror's minds were influenced in any way

by these inquiries that were made. That that examination would give an adequate opportunity for such an inquiry and that being so, I would be inclined to deny defendants' motion here for—

Mr. Shanahan: Well, Judge, if you just hear one further word with reference to this. I can't, for the life of me, see any distinction between a direct approach to a juror and an approach to a neighbor or a relative which is likely in the course of human events, to come to a juror. While I appreciate that this undoubtedly, in the event your Honor would deny our motion, would certainly be a matter which we would pursue in the examination of the jurors, I would say the whole purpose, for instance, of having this hearing in the absence of the jury, would be completely destroyed if we are called upon to openly question the jurors in that regard, because we have no way of knowing that it has come to the attention of all of the jurors that they have checked, and we are certainly going to make that crystal clear to them if we are obliged to examine them in the presence of the others.

Mr. Fischer: I wonder if I might be heard too, your Honor. Your Honor is aware that jurors submit questionnaires. I believe they are sworn in connection with their qualifications. Some of those have been found to be false, but at least they know that they are under scrutiny as to their qualifications to sit. Now, if inquiry is made and they know that that inquiry is made as to their qualifications to sit, I see no harm by it. I don't know how you would preclude it to it possibly coming to their attention. Then, the other thing that I want to point out, this alleged relative, this assertion that is made, I heard no foundation made for it.

Mr. Shanahan: Well, we are willing to prove it, if we have the opportunity.

Mr. Fischer: It hasn't been stated here in any event.

The Court: Well, there is no—certainly any contacts of this nature with a relative, I mean, I am assuming these facts to be so, which counsel has alleged, such contacts in a neighborhood in connection with an inquiry of this kind, doesn't seem to me *per se*, disqualifies a juror from service. There are, of course, an infinite variety of situations that —in the community that might involve some influence on the mind of a juror, and that is the purpose, of course, of the examination of the panel by counsel, to determine whether any of those situations may have, in any way, influenced the mind of a juror. It is fair to assume in a relatively small community, a small county such as this, that there are considerable community interests in the—involved in the designation of jurors to sit on cases involving some matters of public interest. There is a possibility of a myriad number of situations which might involve some influence on the mind of a juror. Counsel presently has been alerted to a situation which holds some possibility here of influences, and all counsel, of course, are permitted to make an examination into all the facts, to determine if, in fact, any influence, any of those situations did influence the mind of jurors.

However, in the absence of some direct showing that there was some improper approach to these jurors themselves, in the absence of such a showing, we are just back to the situation where there might be various influences in the community which were brought to bear on the jurors themselves. That is a situation that I think properly can be explored in the examination of the jurors.

Mr. Shanahan: Well, your Honor, just so that there won't be any question about this, it would be our purpose, if your Honor would permit us to, to show that in one instance, one of these members of the State Police, approached and questioned a brother of one of the prospective jurors. Now, I appreciate that your Honor has asked me if we have any information that a juror himself has been approached, and we have truthfully answered you that we have no such information. But, it would seem to me that it is entirely improper, to compel these defendants to stand trial before a jury panel, where instances such as that, as I have described, have occurred, and I think that the safest course for the Court would be to select a new panel, where the circumstances would not be repeated.

The Court: Well, it is a simple thing, Counsel, and no doubt you would contemplate inquiry of the juror as to whether his brother, if you have this information, if there was any contact made by his brother in this connection.

Mr. Shanahan: Well, I certainly do. I certainly do. But, the point of that is that all of that reacts to the detriment of the defendants, whereas I think that were we permitted to prove that in support of our motion, that perhaps your Honor would feel that we shouldn't be obliged to select then a jury from such a panel.

Mr. Fischer: Well, may I say this. If counsel is willing to name this person, we will certainly check and determine whether or not there was a contact. Possibly there—I don't know, but if it appears to be true, we would stipulate to excuse the juror. It hasn't been done, to our knowledge, but if that is so, why we want to be fair.

The Court: Well, the Court's position would be, in the absence of a showing of some influence being brought to

bear from some source on any one of these individual jurors, in the absence of such a showing, there is no basis for any action on the part of the Court. Whatever the talk in the neighborhood might have been, whatever the talk in the community might have been, and it is fair to assume, as I say, in a case of this sort, in this kind of community, that there would be plenty of talk, in the absence of some showing that some of this talk was brought to these jurors' attention, and in the absence of some showing that the jurors were in some measure influenced by it, it doesn't seem to me that the Court is called upon, at this point, to take any action with reference to the qualifications of the panel.

Mr. Abelove: Well, if your Honor please, as I understand it, we are seeking just that opportunity.

The Court: Well, you will be afforded the opportunity, Counsel, on the examination of jurors.

Mr. Abelove: Well, by that time, the entire matter is before the panel, and the purpose of this being heard in Chambers is—

The Court: Well, I think it is properly—I think it may properly be. I think it is entirely proper to have it the subject of inquiry in the examination of jurors. Of course, in entertaining this motion, in Chambers, the Court had no knowledge of just what might be testified or developed in the way of factual allegations or claims or argument, and I—the Court concurs with counsel in their judgment that it is a matter that might well be heard in Chambers, rather than in the courtroom. But, that fact doesn't in any way indicate to the Court that a proper examination cannot be had of the individual jurors on their examination here as to any influences which might have been brought to bear

on them in connection with their qualifications to sit here. Is there anything further on the application?

Mr. Shanahan: Except to—if we may, respectfully except to your Honor's ruling.

The Court: Surely.

Mr. Abelove: Yes. I would like to join in that exception.

The Court: All right. Anything else before we go back in?

Mr. Shanahan: No.

## APPENDIX C-1

### CHART OF
*Juror Knowledge of Inquiry Made of Their Qualifications*

Analysis of testimony and challenges on the *voir dire* examination of the fifty (50) unaccepted prospective trial jurors examined.

I. *Jurors who were never asked if they had knowledge of background inquiry:*

| | | CHALLENGES | | | |
|---|---|---|---|---|---|
| | | PEREMPTORY | | CAUSE | |
| | | *Defense* | *Prosecution* | *Due to Inquiry into Qualifications* | *Miscellaneous* |
| 1. | James P. Barry, Sr. | | | | Knew one defendant* |
| 2. | Charles J. Richardson | | | | Hearing defect |
| 3. | Carl W. Christ | | | | Opinion of case |
| 4. | Vincent T. Martinelli | | Prosecution | | |
| 5. | Vincent M. Diodati | | | | Knew one defendant* |
| 6. | Thomas J. Eck | | | | Knew one defendant* |
| 7. | Helen G. Evans | Defense | | | |
| 8. | Edward R. Burnop | | | | Opinion of case |
| 9. | George F. Smith | | | | Opinion of case |
| 10. | Anthony DeNigro | | | | Knew both defendants* |
| 11. | Joseph Sobocinski | | | | Opinion of case |



| | | CHALLENGES | | | |
|---|---|---|---|---|---|
| | | PEREMPTORY | | CAUSE | |
| | | *Defense* | *Prosecution* | *Due to Inquiry into Qualifications* | *Miscellaneous* |
| 12. | Rose Gouse | | Prosecution | | |
| 13. | John O. Nichols | | | | Opinion of case |
| 14. | Genevieve Topolski | | | | Opinion of case |
| 15. | James R. Hecox | | | | Family knew one defendant* |
| 16. | Roland E. Youngkrans | | | | Client of one defense attorney* |
| 17. | Joseph A. Passalacqua | | | | Knew one defendant* |
| 18. | Philip F. Vivenzo | | | | Knew one defendant* |
| 19. | Irene V. O'Neil | | Prosecution | | |
| 20. | Earl H. McGauley | | Prosecution | | |
| 21. | Cecil E. Goodenow | | | | Opinion of case |
| 22. | John F. Lutz | | | | Opinion of case |
| 23. | Arthur D. Griffith (Alternate) | | | | Knew two defense attorneys* |
| 24. | Emory J. DePhillips (Alternate) | | | | Knew many city officials* |
| 25. | Edward H. Isley (Alternate) | | | | Opinion of case |
| 26. | Helen F. Cawley (Alternate) | | | | Opinion of case |

| | | Peremptory | | Cause | |
|---|---|---|---|---|---|
| | | *Defense* | *Prosecution* | *Due to Inquiry into Qualifications* | *Miscellaneous* |
| II. | ***Jurors who were asked but stated they had no knowledge of any background inquiry:*** **(If it came to their attention, it would not affect their judgment or verdict)** | | | | |
| 27. | **Earl L. Brown** | | **Prosecution** | | |
| 28. | **Lee Cole** | **Defense** | | | |
| 29. | **Pearl Overton** | **Defense** | | | |
| 30. | **Walter M. Zielinski** | | **Prosecution** | | |
| 31. | **Kathryn F. Doyle** | **Defense** | | | |
| 32. | **Fred J. Price** | **Defense** | | | |
| 33. | **George T. Nolan** | | | Hearing defect | |
| 34. | **Irving Bartholomay** | | **Prosecution** | | |
| 35. | **Roger G. Bush** | | **Prosecution** | | |
| 36. | **Martha J. Adams** | **Defense** | | | |
| 37. | **Laura J. Schoff** | **Defense** | | | |
| 38. | **Frederick D. Prevo** | **Defense** | | | |
| 39. | **Lester D. Tuttle** | **Defense** | | | |
| 40. | **Philip U. Brown** | **Defense** | | | |
| 41. | **Chauncey M. Edell** | | **Prosecution** | | |
| 42. | **Lyle E. Selden** | **Defense** | | | |
| 43. | **Joanne L. Townsend** | **Defense** | | | |



| | | Peremptory | | Cause | |
|---|---|---|---|---|---|
| | | *Defense* | *Prosecution* | *Due to Inquiry into Qualifications* | *Miscellaneous* |
| II-a | ***Jurors who were asked but stated they had no knowledge of any background inquiry:*** **(These jurors were never asked if their judgment or verdict would be affected)** | | | | |
| 44. | **Henry S. Zebrowski** | | **Prosecution** | | |
| 45. | **Florence L. Miller** | **Defense** | | | |
| III. | ***Jurors who were asked and stated they heard of back ground inquiry from neighbors—but they never learned who inquired:*** **(It would not affect their judgment or verdict)** | | | | |
| 46. | **Loreine M. Tooke** | **Defense** | | | |
| 47. | **Michael J. Ledwick** | | **Prosecution** | | |
| 48. | **Carl G. Flock (fol. 684) (Alternate)** | | **Prosecution** | | |
| IV. | ***Juror who was asked and stated he heard of background inquiry from neighbor—but he was not asked who inquired:*** **(It would not affect his judgment or verdict)** | | | | |
| 49. | **James A. Coyle, Jr. (Alternate)** | **Defense** | | | |

| | Peremptory | | Cause | |
|---|---|---|---|---|
| | *Defense* | *Prosecution* | *Due to Inquiry into Qualifications* | *Miscellaneous* |
| **V. *Juror who was asked and stated he heard of background inquiry from neighbors—and the inquirer was State Police Officer:*** **(It would not affect his judgment or verdict)** | | | | |
| **50. Vincent Potrzeba** | | **Prosecution** | | |
| **Totals:** **50 unaccepted jurors** | **15 (inc. 1 alternate)** | **13 (inc. 1 alternate)** | **0** | **22 (inc. 4 alternates)** |

**Note:** 1. None of the jurors stated they had any personal contact with any inquirer.
2. Alternate juror Carl G. Flock was *only* juror who resented inquiry made of neighbor: "If they wanted to know something, why didn't they come to me."
3. *No juror was challenged for cause by the defense because of the inquiry made into the background qualifications of jurors.*

* Ten of the fifty unaccepted jurors stated that they knew a defendant, defense attorney or friends.



## APPENDIX C-2

### CHART OF
*Accepted Jurors' Knowledge of Inquiry Made of Their Qualifications*

Analysis of testimony on the *voir dire* examination of the twelve (12) accepted petit jurors and the two (2) accepted alternate jurors.

| *Category of Knowledge* | *Juror* | *Remarks* |
|---|---|---|
| I. Juror who was never asked if she had knowledge of back ground inquiry: | Mabel M. Regan | None |
| II. Jurors who were asked but stated they had no knowledge of any background inquiry: | Glen M. [illegible]tchinson | (fol. 394). None |
| | Willian Besig | (fol. 582). None |
| | Robert J. Calkins (Alternate) | (fol. 640). None |
| III. Jurors who were asked and stated they heard of background inquiry —but they never learned who inquired: | Victor M. Basile | "The neighbor called the wife up. I didn't know anything about it." (fol. 422). |
| | Robert E. Kane | Postmistress told him of inquiries being made. He never asked who made the inquiries. (fol. 494). |

| *Category of Knowledge* | *Juror* | *Remarks* |
|---|---|---|
| IV. Jurors who were asked and stated they heard of background inquiry —but they were not asked who inquired: | F. Daisy Head | A neighbor told her. "I was honored. It didn't affect me at all." (fol. 267). |
| | William Eisenhut | "* * * some of my neighbors * * * said that they had been asked questions about me, but that is as far as it went * * *" (fol. 310). |
| | Jessie E. O'Neil | None (fol. 552). |
| | Chester J. Mandry (Alternate) | Learned of inquiry from wife who heard it from neighbors (fol. 617) —*he is a client of one defense attorney.* (fol. 606). |
| V. Jurors who were asked and stated they heard of background inquiry —and the inquirer was a State Police Officer: | John F. Ledwith | "I have complete faith in the integrity of our New York State Police and would have no bearing on any decision I might make" (fol. 237). |
| | Rita A. Maloy | None (fol. 363). |
| | John Oertle | Heard rumors in the local barbershop of inquiries being made (fol. 464). |
| | John J. Keating | His mother, who is his neighbor, told him of inquiries being made. "That meant nothing." (fol. 521). |

## APPENDIX D

CHAPMAN A. THOMAS, for Defendant Bollettieri, Cross.

Q. Now, Mr. Shanahan asked you if you appeared before the—or were called before the Grand Jury, and I think you said yes? A. I was.

Q. Did you testify before the Grand Jury? A. No, I didn't.

Q. Was that on advice of counsel? A. That was on advice of counsel.

Q. Who was your counsel? A. Mr. Pawlinga.

Q. And did you discuss this case with Mr. Pawlinga? A. I did.

Q. Did you discuss it with him before you went and were called before the Grand Jury? A. Sir?

Q. Did you discuss it with him when you were called before the Grand Jury? A. Yes.

Q. And before that? A. Before that.

Q. Well, did you tell Mr. Pawlinga that you testified before the Grand Jury? A. No, I didn't.

Q. Well, did you tell him that you testified as to four requisitions which were attached to the supposedly fraudulent vouchers and purchase orders? A. Before the—

Mr. Shanahan: Well, I object to the form of that, supposedly fraudulent orders.

Mr. Fischer: Well, I will mark this.

Mr. Shanahan: Improper characterization.

Mr. Fischer: Surely.

Mr. Shanahan: Improper characterization.

Mr. Fischer: I am reading from Mr. Pawlinga's affidavit.

The Court: Well, we will mark it for identification, and await a ruling, until we have an oppor-

tunity to determine the basis for the question. That would be marked then as People's Exhibit 143.

(Whereupon, an affidavit was then received and marked People's Exhibit 143 for identification.)

The Court: Are you going to reframe your question, Counselor, or do you want the—or I would like the first part repeated, if you don't contemplate reframing it.

Mr. Fischer: I will repeat it, your Honor.

By Mr. Fischer:

Q. Did you tell Mr. Pawlinga before September 21st of 1959, that you did testify before the Grand Jury concerning vouchers and purchase orders? A. I—not the Grand Jury, at your office.

Q. Well, did you tell him you testified before the Grand Jury concerning the purchase orders and vouchers? A. No, I did not.

Q. You did not? A. No.

Q. Did you tell Mr. Pawlinga that it was your belief that a Frank Garcia, a foreman in the Department of Public Works, had caused these requisitions submitted to you this morning, to be issued by you for material? A. He could have.

The Court: Now, that doesn't answer the question. Repeat the question please, Mr. Hunt. The answer may be stricken out.

Mr. Shanahan: Exception.

(Whereupon, the last question by Mr. Fischer was then read by the reporter.)

By Mr. Fischer:

Q. Do you understand the question? A. Did I tell Mr. Pawlinga that Garcia—

*Appendix D*

Q. Did you tell Mr. Pawlinga that it was your belief that Frank Garcia, a foreman in the Department of Public Works, had caused these requisitions submitted to you this morning for identification, to be issued by you for materials? A. No.

Q. Did you tell him that? A. No.

Q. Did you also tell Mr. Pawlinga that you could not identify the signatures on the pink slips, and/or the purchase orders? Did you tell Mr. Pawlinga that? A. On the pink slip of the purchase order?

Q. Yes. A. No.

Mr. Shanahan: Well, wait a minute. Would you read that? Would you repeat that question, please?

(Whereupon, the last question and answer were then read by the reporter.)

By Mr. Fischer:

Q. Now, you testified, did you not, before the Attorney General's office on December 17th of 1959? A. I don't know just exactly the date, but I did testify.

Mr. Fischer: I submit a copy of the minutes. I have only one copy, your Honor, for defense counsel. They can perhaps share it. And I will mark this for identification, if I may.

The Court: People's Exhibit 144 for identification.

(Whereupon, minutes were then received and marked People's Exhibit 144 for identification.)

By Mr. Fischer:

Q. When you were asked in connection with these purchase orders and vouchers before the Attorney General's office on December 17th of 1959, you refused to answer

questions in connection with them on the grounds that those answers might tend to incriminate you, isn't that so?

Mr. Shanahan: Pardon me. Before you answer it, would you read that, please?

(Whereupon, the last question by Mr. Fischer was then read by the reporter.)

Mr. Shanahan: Now, what page is this? I haven't had a chance to look at this, of course.

Mr. Fischer: Well, I am not reading from it, I am posing to him a general question. Do you understand the question?

The Witness: I do.

By Mr. Fischer:

Q. All right, will you respond to it? A. I refuse to answer.

The Court: What? Will you repeat the question please, Mr. Hunt?

(Whereupon, the reporter then repeated the same question as before.)

The Witness: Yes.

By Mr. Fischer:

Q. Well now, are you no longer of the opinion that any answers you give about those requisitions will incriminate you?

Mr. Shanahan: Well, I object to that if the Court please. This witness has given testimony. I submit it is argumentative.

The Court: Overrule the objection, Counselor.

Mr. Shanhan: Exception.

The Court: Cross examination. Will you repeat the question please, Mr. Hunt?

(Whereupon, the last question by Mr. Fischer was then read by the reporter.)

The Witness: No.

By Mr. Fischer:

Q. You are no longer of the opinion that they will incriminate you? A. That is right.

Q. You have since, being called before the Grand—the Attorney General's office on December 17th, you have since changed your mind, is that correct, sir? A. I could answer them but—

The Court: Well, will you repeat—did you take the question, Mr. Light? Will you repeat it please, that last question?

(Whereupon, the last question by Mr. Fischer was then read by the reporter.)

The Court: Answer yes or no.

The Witness: Yes.

By Mr. Fischer:

Q. You have since changed your mind. Now, on page 12 of the minutes of December 17, 1959, were you asked this question and did you give this answer, "Did you, destroy, Mr. Thomas, any copies of the purchase requisitions prepared in your department during the year 1957?" "A. I refuse to answer on the grounds that it might incriminate me."

Mr. Shanahan: Well, if the Court please, I object to this that it is not in any manner contradictory of any testimony given by this witness, that the witness had the privilege and the right if he saw fit to exercise it to claim his privilege. And that answer

does not constitute any admission of the correctness of the question.

The Court: I would so instruct the jury in accordance with your statement. I would state that Counsel's statement is absolutely correct. However, are you objecting to the question?

Mr. Shanahan: I do object to the question upon the ground that the only purpose for which I know, is that it's proper to cross examine a witness using previous testimony is when the testimony contradicts the testimony given at a later time by that same witness. And my point is, of course, that the answer as read does not have the effect of being contradictory and, therefore, that it is incompetent and improper.

The Court: I will certainly instruct the jury in accordance with the statement made by Mr. Shanahan. With reference to his characterization of the effect of the taking of this constitutional privilege by the witness. However, any previous acts or statements or declarations of the witness in his course of life are admissible in this examination, of cross examination. And I will allow the question and direct the witness to answer.

Mr. Shanahan: Well, your Honor, I have no desire to argue the matter at this time, and ask that it be held in abeyance however, until I get an opportunity to do—I am very sure that I can call to your Honor's attention some decisions indicating that a claim of privilege is not a proper means, that is, to show a previous claim of privilege is not proper method to cross examine. And that is the only pur-

pose for which this could be used, would be to contradict. I don't go along with your Honor on the proposition that anything—

The Court: You say you have no authority at this time, Counselor?

Mr. Shanahan: I don't have any in my hand. I didn't anticipate this.

The Court: We will take a short recess, members of the jury, and bear in mind that during the period of the recess you are not to discuss the case amongst yourselves or with anyone or form or express any opinion until the case is finally submitted to you.

(Whereupon, a short recess was then taken.)

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(Proceedings after recess.)

The Clerk: If the Court please, the defendants, the jury and the attorneys and the witness in the box, are all present.

The Court: All right. Would you repeat the last question, Mr. Light?

(Whereupon, the last question and answer were then read by the reporter.)

The Court: I will reserve on that, you may proceed.

CROSS EXAMINATION by Mr. Fischer (Continuing):

Q. All right, sir. I will withdraw that, the question now, in any event, for the record.